

United States
Circuit Court of Appeals
For the Ninth Circuit.

SOUTHWEST METALS COMPANY, a Corporation,
Plaintiff in Error,

vs.

FRANCISCO GOMEZ,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Arizona.

FILED
JAN 4 1925
F. B. WASHINGTON

United States
Circuit Court of Appeals
For the Ninth Circuit.

SOUTHWEST METALS COMPANY, a Corpora-
tion,

Plaintiff in Error,

vs.

FRANCISCO GOMEZ,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Arizona.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

| | Page |
|--|------|
| Amended Complaint | 11 |
| Assignment of Errors..... | 91 |
| Bill of Exceptions..... | 33 |
| Certificate of Clerk U. S. District Court to Transcript of Record..... | 103 |
| Citation on Writ of Error..... | 99 |
| Demurrer and Answer..... | 1 |
| EXHIBITS: | |
| Plaintiff's Exhibit No. 1—Card Showing Discharge of Francis Gomez from Hospital, Dated July 19, 1923..... | 20 |
| Defendant's Exhibit No. 2—Accident Re- port Dated May 8, 1919..... | 21 |
| Judgment | 25 |
| Minutes of Court—September 10, 1923—Order Sustaining Demurrer | 10 |
| Minutes of Court—June 26, 1924—Order Ap- pointing Physician to Make Physical Ex- amination of Plaintiff..... | 14 |
| Minutes of Court—July 28, 1924—Order Over- ruling Demurrer to Amended Complaint.. | 15 |
| Minutes of Court—August 7, 1924—Trial..... | 16 |

| | Index. | Page |
|---|--------|------|
| Minutes of Court—August 8, 1924—Judgment | | 25 |
| Minutes of Court—August 8, 1924—Trial (Continued—August 8, 1924)..... | | 18 |
| Minutes of Court—August 12, 1924—Order Extending Time to File Bill of Exceptions... | | 27 |
| Minutes of Court—October 13, 1924—Order Overruling Motion for New Trial..... | | 81 |
| Minutes of Court—October 16, 1924—Order Extending Time to and Including October 18, 1924, to Settle Bill of Exceptions..... | | 82 |
| Minutes of Court—October 18, 1924—Order Extending Time to and Including October 25, 1924, to Settle Bill of Exceptions..... | | 83 |
| Minutes of Court—October 25, 1924—Order Extending Time to and Including November 1, 1924, to Settle Bill of Exceptions.. | | 84 |
| Minutes of Court—November 1, 1924—Order Re Withdrawal of Bill of Exceptions..... | | 85 |
| Motion for New Trial..... | | 27 |
| Names and Addresses of Attorneys of Record | | 1 |
| Order Allowing Writ of Error and Stay of Execution | | 87 |
| Order Appointing Physician to Make Physical Examination of Plaintiff..... | | 14 |
| Order Extending Time to and Including October 18, 1924, to Settle Bill of Exceptions.. | | 82 |
| Order Extending Time to and Including October 25, 1924, to Settle Bill of Exceptions.. | | 83 |
| Order Extending Time to and Including November 1, 1924, to Settle Bill of Exceptions | | 84 |

| Index. | Page |
|--|------|
| Order Extending Time to File Bill of Exceptions | 27 |
| Order Fixing Amount of Supersedeas and Cost Bond | 81 |
| Order Overruling Demurrer to Amended Complaint | 15 |
| Order Overruling Motion for New Trial..... | 81 |
| Order Re Withdrawal of Bill of Exceptions... | 85 |
| Order Settling Bill of Exceptions..... | 80 |
| Order Sustaining Demurrer..... | 10 |
| Petition for Writ of Error..... | 86 |
| Praecipe for Transcript of Record..... | 101 |
| Supersedeas and Cost Bond..... | 89 |
| TESTIMONY ON BEHALF OF PLAINTIFF: | |
| BAKES, Dr. EDWIN C. (Recalled in Rebuttal) | 78 |
| Cross-examination | 78 |
| Redirect Examination | 78 |
| GOMEZ, FRANCISCO | 34 |
| Cross-examination | 37 |
| Redirect Examination | 40 |
| Recross-examination | 41 |
| LOPEZ, FRANCISCO | 41 |
| Cross-examination | 42 |
| TESTIMONY ON BEHALF OF DEFENDANT: | |
| BAKES, Dr. EDWIN C. | 53 |
| Cross-examination | 56 |
| Redirect Examination | 58 |

| | Index. | Page |
|--|--------|------|
| TESTIMONY ON BEHALF OF DEFEND- ANT—Continued: | | |
| BENEDICT, Mrs. TESSIE M. | | 51 |
| BUCK, Dr. ROBERT C. | | 46 |
| Cross-examination | | 49 |
| Redirect Examination | | 51 |
| CHRISTIAN, Dr. PAUL C. | | 76 |
| Cross-examination | | 77 |
| Redirect Examination | | 77 |
| CULP, DEAN HARDEE..... | | 60 |
| Cross-examination | | 63 |
| DAVEY, THOMAS S. | | 64 |
| Cross-examination | | 65 |
| Redirect Examination | | 66 |
| FRANKLIN, Dr. ROBERT T. | | 43 |
| GATTERDAM, Dr. E. A. | | 75 |
| ROSEVEARE, GEORGE H. | | 73 |
| SWINEY, WILLIAM | | 66 |
| Cross-examination | | 67 |
| VIVIAN, Dr. CHARLES S. | | 45 |
| Recalled | | 60 |
| Recalled | | 73 |
| WHITE, JOSEPH L. | | 68 |
| Cross-examination | | 72 |
| Redirect Examination | | 72 |
| Recross-examination | | 72 |
| Trial | | 16 |
| Trial (Continued—August 8, 1924)..... | | 18 |
| Verdict | | 24 |
| Writ of Error..... | | 97 |

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

ANDERSON & GALE, Prescott, Arizona,
Attorneys for Plaintiff in Error.

D. A. FRASER, Phoenix, Arizona,
JENNINGS & STROUSE, Phoenix, Arizona,
Attorneys for Defendant in Error.

In the District Court of the United States in and
for the District of Arizona.

No. L-151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corpora-
tion,

Defendant.

DEMURRER AND ANSWER.

Comes now the above-named defendant, by its attorneys, and not waiving any of its defenses hereinbefore interposed, for answer to the complaint on file herein, demurs to said complaint upon the following grounds:

I.

That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

II.

That the same does not state facts sufficient to constitute a cause of action against this defendant under the Employers' Liability Act of the State of Arizona, under which said act said complaint appears to have been filed.

III.

That said complaint does not set out facts that will support or authorize a recovery of compensatory damages for the alleged injury therein complained of.

IV.

That it affirmatively appears upon the face of said complaint that the injuries therein complained of did not result from any accident contemplated by the said Employers' Liability Act. [1*]

V.

That it affirmatively appears upon the face of said complaint that the injuries therein complained of were not sustained in, and did not arise out of or in the course of the employment of the said plaintiff, in the service of the defendant.

VI.

That it does not appear from said complaint that the said alleged injuries were due to a condition or conditions of the employment or occupation of the said plaintiff.

VII.

That it appears from said complaint that the injuries complained of were not attributable to any hazard or risk, or any hazards or risks which were

*Page-number appearing at foot of page of original certified Transcript of Record.

inherent in the occupation or employment of the said plaintiff.

VIII.

That it does not appear from said complaint that the injuries complained of were sustained in any labor, service or employment in any hazardous occupation within the terms and provisions of the Employers' Liability Act.

IX.

That it does not appear from said complaint that the injuries complained of were sustained while the said plaintiff was engaged as a workman at manual and mechanical labor in a hazardous occupation defined to be hazardous by said Employers' Liability Act.

X.

That it does not appear from said complaint that the alleged accident and injuries resulting therefrom, if any such resulted, were due to the risk and hazard or risks or hazards which are inherent in a hazardous occupation as defined by [2] said Employers' Liability Act, and which were unavoidable by the said plaintiff, while engaged in said hazardous occupation or employment within the terms and meaning of said Employers' Liability Act.

XI.

That it appears on the face of said complaint that the injuries complained of were caused by the negligence of the said plaintiff.

XII.

That it does not appear from said complaint that

the plaintiff has any right of action against the defendant for the alleged injuries.

XIII.

That it appears from said complaint that the plaintiff has no right of action against the defendant for the injuries complained of.

XIV.

That it appears from said complaint that the accident complained of, and the injuries resulting therefrom, if any such there were, were not due to an inherent risk or hazard of said plaintiff's employment, but that the same resulted from conditions and causes that were well known to the said plaintiff, and that he assumed the risk and hazard of injury therefrom.

XV.

That it appears from said complaint that the accident complained of and the injuries resulting therefrom, if any such there were, was not due to an inherent risk or hazard of the said plaintiff's employment, but that the same resulted from conditions and causes that were well known to him, and that he could have avoided the same and the resultant injuries [3] therefrom, if any such there were, by the exercise of that degree of care and caution required of him by the terms of the said Employers' Liability Act.

XVI.

That it appears that said complaint does not state facts permitting a recovery under the terms and conditions of the Employers' Liability Act of Arizona, or any amendment thereof, in this, to wit:

That it does not show that said injuries complained of, if any such there were, were due because of risks and hazards, or a risk and hazard, which are inherent in the hazardous occupations set forth in said act, and which are unavoidable by the workmen therein, and, further, that it fails to show that the injuries complained of were caused in the course of work at manual and mechanical labor, or manual or mechanical labor, in any of the employments or occupations enumerated in said Employers' Liability Act by any accident arising out of, and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, and, further that it fails to show that said injuries complained of were not caused by the negligence of the said plaintiff.

XVII.

That said complaint shows that said injuries complained of were not due solely to an accident arising in the course of the employment of the said plaintiff, and said injuries were not due solely to the inherent conditions, risks and hazards of his said employment and occupation.

XVIII.

That said complaint shows that plaintiff is claiming damages other, greater and different than the damages recoverable under said Employers' Liability Act. [4]

XIX.

That it appears upon the face of said complaint, that said action is based upon the Employers' Liability Act of the State of Arizona, and that the said

Employers' Liability Act is unconstitutional and void, and in violation of Sections 5 and 7, of Article 18 of the Constitution of the State of Arizona, in that it, upon its face, prevents the defense of contributory negligence and assumption of risk from being submitted as questions of fact, at all times to the jury, and in that it deprives the defendant of the defense of contributory negligence, and in that it attempts to deprive the defendant of the defense that the injured workman has assumed the risk.

WHEREFORE, defendant prays judgment as to the sufficiency of said complaint, and for its costs.

ANDERSON, GALE & NILSSON,
Attorneys for Defendant.

ANSWER.

Comes now the defendant above named, and not waiving any defense hereinbefore interposed, for further answer to said complaint says:

I.

Denies each and every, all and singular, the allegations of said complaint, except such as are herein expressly admitted.

II.

Denies that by reason of any of the matters and things set out in plaintiff's said complaint, the said plaintiff has been damaged in the sum alleged in said complaint, or in any other sum whatever. [5]

III.

Denies that plaintiff was engaged in manual and mechanical labor, or manuul or mechanical labor in any employment or occupation declared to be haz-

ardous by the Employers' Liability Act of Arizona, at the time he sustained the alleged injuries complained of. Denies that such injuries, if any such there were, were due to an accident. Denies that such injuries, if any, arose out of, or in the course of the labor and employment of the said plaintiff in any such hazardous occupation. Denies that said injuries, if any, were due to a condition or conditions of the occupation or employment of plaintiff at the time he received such injuries. Denies that said injuries, if any, were due to any risk or hazard, or risks or hazards inherent in the occupation or employment in which the said plaintiff was then engaged.

IV.

Defendant alleges the facts to be that the injuries sustained by plaintiff, if any such there were, were caused by the negligence, carelessness, fault and improper conduct of said plaintiff, and would not have occurred but for his negligence, carelessness, fault and improper conduct, and that the said plaintiff's carelessness, negligence, fault and improper conduct was the proximate and direct cause of his said injuries, if any such there were.

V.

Defendant alleges the fact to be that the injuries sustained by plaintiff, if any such there were, were caused by the violation by him of the orders, rules and regulations and instructions promulgated by the defendant for the safety of said plaintiff and his coemployees, and for the protection [6] of its property, and he had full and complete knowledge

and notice, prior to his violation of the same, of said orders, rules, regulations and instructions.

VI.

Defendant alleges that the accident resulting in the injuries to plaintiff, if any, was not due to an inherent risk or hazard of his employment or occupation, but that the same resulted from conditions and causes that were well known to him, and that he assumed the risk and hazard of injury therefrom.

VII.

Defendant denies that plaintiff is entitled to recover in this cause of action, any damages under and by virtue of the Arizona Employers' Liability Act, or any amendment thereof.

VIII.

Defendant denies that plaintiff has any right of action against the defendant for the alleged injuries complained of.

IX.

Defendant alleges that plaintiff has no right of action against the defendant for the alleged injuries complained of.

X.

Defendant denies that plaintiff, in the course of work in any of the employments or occupations enumerated in the said Employers' Liability Act, received injuries by any accident arising out of and in the course of manual and mechanical, or manual or mechanical labor, service and employment, and due to a condition or conditions of such occupation or employment. [7]

XI.

Defendant denies that plaintiff, at the time of said injuries so received by him, if any such there were, was in the exercise of due care and caution, but alleges the fact to be that said accident and the resultant injuries, if any such there were, were caused by his negligence.

XII.

Defendant denies that plaintiff was injured by any inherent risk or hazard in his alleged occupation which was unavoidable by him.

XIII.

Defendant denies that plaintiff has suffered any pecuniary loss by reason of the matters and things set forth in said complaint, and denies that he has suffered any injuries that would sustain a verdict or judgment for compensatory damages, or any damages against this defendant.

WHEREFORE, defendant prays judgment that plaintiff take nothing by said complaint, and for its costs.

ANDERSON, GALE & NILSSON,
Attorneys for Defendant.

[Endorsed]: Demurrer and Answer. Filed Sep. 1, 1923. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [8]

In the United States District Court in and for the
District of Arizona.

Regular September, 1923, Term, at Prescott.
Honorable F. C. JACOBS, United States District
Judge, Presiding.

(Minute Entry of Monday, September 10th, 1923.)

No. L-151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corpora-
tion,

Defendant.

MINUTES OF COURT—SEPTEMBER 10, 1923
—ORDER SUSTAINING DEMURRER.

Attorneys I. A. Jennings, C. L. Strouse, and D. A. Fraser, are present for the plaintiff. Messrs. Anderson, Gale & Nilsson appear for the defendant.

IT IS ORDERED that defendant's general demurrer to plaintiff's complaint is hereby sustained, and the plaintiff is given ten (10) days to amend said complaint.

IT IS FURTHER ORDERED that this case is passed for future setting. [9]

In the District Court of the United States in and
for the District of Arizona.

No. L-151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corpora-
tion,

Defendant.

AMENDED COMPLAINT.

Comes now the plaintiff, and for a cause of action
against the defendant, complains and alleges:

I.

That the defendant now is, and was at all times
hereinafter mentioned, a corporation, duly organ-
ized and doing business within the County of Yava-
pai, State of Arizona; that the said defendant is the
owner of and engaged in operating mines within the
aforesaid County and State.

II.

That this is a suit between citizens of different
States, the plaintiff being a citizen of the State of
Arizona; the defendant being a citizen of the State
of Delaware; that said suit involves exclusive of
interest and costs, a sum in excess of Three Thou-
sand (\$3,000.00) Dollars, to wit, the sum of Ten
Thousand (\$10,000.00) Dollars.

III.

That heretofore, and on the 13th day of June,

1923, the defendant had in its employ the plaintiff, working as a manual laborer, in and about the aforesaid mines of said defendant; that on said date, the plaintiff was injured by an accident arising out of and in the course of his labor, service and employment, and due to a condition or conditions of such occupation or employment; that the said accident and injuries resulting therefrom, were not due to or caused by plaintiff's own negligence; [10]

That plaintiff sustained said injuries in substantially the manner following:

The plaintiff on said date was employed and at work, as a miner, in one of said defendant's mines, know as the Blue Bell mine, and on the 1200 ft. level thereof, in stope No. 40, and in the usual course of his employment was picking rock with a bar, when a small piece of rock, dust or debris dropped from the roof of said stope, striking the plaintiff in the left eye, injuring said left eye; that as a result of said injury to said eye, and without fault on the part of this plaintiff, the said eye became infected, and the plaintiff's vision in his said left eye was permanently and totally destroyed; that by reason thereof, the plaintiff has suffered great physical pain and has been disabled from following his usual occupation of a miner and manual laborer; all to his damage in the sum of Ten Thousand (\$10,000.00) Dollars.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Ten Thousand (\$10,000.00) Dollars and for his costs.

D. A. FRASER,
JENNINGS & STROUSE,
Attorneys for Plaintiff.

[Endorsed]: Amended Complaint. Filed Sept. 17, 1923. C. R. McFall, Clerk. By M. R. Malcolm, Deputy.

Copy of the within amended complaint received this 17th day of September, 1923.

ANDERSON, GALE & NILSSON. [11]

Regular March, 1924, Term, at Prescott.

In the United States District Court in and for
the District of Arizona.

Honorable F. C. JACOBS, United States District
Judge, Presiding.

(Minute Entry of Thursday, June 26th, 1924.)

No. L-151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corpora-
tion,

Defendant.

MINUTES OF COURT—JUNE 26, 1924—ORDER APPOINTING PHYSICIAN TO MAKE PHYSICAL EXAMINATION OF PLAINTIFF.

Comes now the defendant, Southwest Metals Company, by its counsel, Anderson, Gale & Nilsson, Esqs., and on motion of said counsel,

IT IS ORDERED BY THE COURT that Dr. Robert A. Buck is hereby appointed to make a physical examination of the plaintiff, Francisco Gomez, at the office of Dr. Buck, said examination to be made not later than five days before the date set for trial of this case, and the said plaintiff is hereby directed to be so examined. [12]

Regular March, 1924, Term, at Prescott.

In the United States District Court in and for the District of Arizona.

Honorable F. C. JACOBS, United States District Judge, Presiding.

(Minute Entry of Monday, July 28th, 1924.)

No. L-151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corporation,

Defendant.

MINUTES OF COURT—JULY 28, 1924—ORDER OVERRULING DEMURRER TO AMENDED COMPLAINT.

I. A. Jennings, Esq., is present for the plaintiff. Messrs. Anderson, Gale & Nilsson, Esqs., appear for the defendant.

IT IS ORDERED that defendant's demurrer to amended complaint herein be and the same is hereby overruled, and the case is set for trial August 6, 1924, at 10 o'clock A. M.

IT IS FURTHER ORDERED that the plaintiff, Francisco Gomez, appear before Dr. Robert A. Buck at his office at Fort Whipple, Arizona, on or before August 4th, 1924, and submit himself for physical examination by said physician as to the injuries alleged in the complaint herein in order to qualify said physician to give testimony in reference to same at trial of this case;

IT IS FURTHER ORDERED that a representative of both parties may be present at said examination. [13]

Regular March, 1924, Term, at Prescott.

In the United States District Court in and for the
District of Arizona.

Honorable F. C. JACOBS, United States District
Judge, Presiding.

(Minute Entry of Thursday, August 7th, 1924.)

No. L-151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corpora-
tion,

Defendant.

MINUTES OF COURT—AUGUST 7, 1924—
TRIAL.

This cause comes on regularly for trial this date.

D. A. Fraser, Esq., and I. A. Jennings, Esq.,
appear for the plaintiff, Francisco Gomez; Leroy
Anderson, Esq., and A. H. Gale, Esq., appear for
the defendant, Southwest Metals Company.

Both sides announce readiness for trial, where-
upon, D. A. Little is duly sworn as court reporter.
A jury of twelve men is duly empaneled according
to law and the rules and practice of this court, and
by the clerk duly sworn to try the case. All jurors
now in attendance and not selected to try this case
are ordered excused for the term.

The complaint and answer are read to the jury by respective counsel.

Gregorio Ruiz is duly sworn as Spanish interpreter.

To maintain this case, the plaintiff, Francisco Gomez, is duly sworn and examined as a witness.

The plaintiff calls Francisco Lopez who was sworn and examined.

Thereupon, the plaintiff rests, with the exception of one witness to be called later.

To maintain its case, the defendant calls the following witnesses who are duly sworn and examined:

R. T. Franklin.

Chas. S. Vivian.

Dr. Robert C. Buck.

Tessie M. Benedict.

Thereupon, further trial is ordered continued to 9:30 A. M., August 8th, 1924. [14]

Regular March, 1924, Term, at Prescott.

In the United States District Court in and for the
District of Arizona.

Honorable F. C. JACOBS, United States District
Judge, Presiding.

(Minute Entry of Friday, August 8th, 1924.)

No. L-151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corpora-
tion,

Defendant.

MINUTES OF COURT—AUGUST 8, 1924—
TRIAL (CONTINUED).

The plaintiff, respective counsel and the jury are all present pursuant to adjournment, whereupon, further trial is resumed.

The plaintiff calls Edwin C. Bakes as a witness, who is duly sworn and examined, and the plaintiff rests.

The defendant moves for a directed verdict, which motion is by the Court denied.

In continuance of its case, the defendant recalls Dr. Vivian for further examination.

The defendant also calls the following witnesses, who are duly sworn and examined.

Wm. H. Culp.

Thos. S. Davey.

W. W. Swiney.

Joseph L. White.

Geo. H. Roseveare.

E. A. Gatterdam.

Paul C. Christian.

Defendant's Exhibit No. 2 (accident report) is admitted and filed.

Plaintiff's Exhibit No. 1 (a card) is admitted and filed.

Thereupon, the defendant rests.

The defendant now moves for a directed verdict, which motion is by the Court ordered denied.

The plaintiff recalls Dr. Bakes in rebuttal for further examination, and closes its case. [15]

I. A. Jennings, Esq., counsel for the plaintiff makes argument to the jury, the defendant waives argument.

Thereupon, the Court instructs the jury; two bailiffs are duly sworn to take charge of the jury, and the jury retire at 4:15 P. M. to consider of their verdict.

At 7:55 P. M., all counsel being present, the jury return into the courtroom and report that they have agreed upon a verdict, and thereupon, through their foreman, the jury return the following verdict:

No. L-151 (PRESCOTT).

“FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corpora-
tion,

Defendant.

VERDICT.

We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff and assess his damages at One Thousand Dollars.

E. C. SUMAN,
Foreman.”

Thereupon the jury is ordered discharged for the term. [16]

PLAINTIFF'S EXHIBIT No. 1.

Copy.

CONSOLIDATED ARIZONA SMELTING CO.
Humboldt, Arizona.

Blue Bell Dept.

Date—July 19, 1923.

Mr. Foreman
Supt.

Mr. FRANCIS GOMEZ
(Occupation)

is discharged from the hospital this date and able

to return to duty, having laid off for the following reasons: Injury of left eye Cornea ulcer.

Date entered hospital—July 14.

Date discharged hospital—July 19.

DR. R. T. FRANKLIN,

Chief Surgeon.

sp. P— P. CHRISTIAN.

[Endorsed]: Plaintiff's Exhibit No. One. Admitted and filed Aug. 8, 1924. C. R. McFall, Clerk. Case No. L-151. Gomez vs. S. W. Metals Co. [17]

DEFENDANT'S EXHIBIT No. 2.

(Front side)

CONSOLIDATED ARIZONA SMELTING CO.
File A550.

————— Department.

BLUE BELL MINE—Mine.

May 8th, 1919. 19—.

If accident involves serious or fatal injury telephone immediately to the Hospital and safety Department, also when an inquest is to be held.

- (1) Injured person's name—FRANC GOMEZ.
Nationality: Mexican.
- (2) About how old? 37 yrs.
- (3) Occupation: Stoper Miner. Pay-Roll No. 133.
- (4) Daily Wage? \$4.65.
- (5) Married or single: Married.
- (6) Address: Blue Bell Mine.
- (7) City or town: Mayer.
- (8) State: Arizona.

- (9) In whose service: Cons. Arizona Smelt. Co.
- (10) General Duties: Operating Stoper Machine.
- (11) How long employed prior to accident? 1 yr. 6 mo.
- (12) How long employed in this work? 1 yr. 6 mo.
- (13) Experienced: Had he performed similar work prior to this employment? Yes. Was he engaged in his regular occupation at the time of the injury? Yes.
- (14) Was the injured person familiar with the work engaged in, or the machine being operated at the time of the accident? Yes. State experience so far as known.
- (15) Was he in full charge of machine, to what extent, could he start and stop at will?
- (16) Was the machine sound and in good working order at the time of the accident?
Last inspected?
Probable period of disability?
- (17) Nature and extent of injury? Piece of rock hit him in the left eye. (Be definite, if hand or foot state which.)
- (18) Name of attending Surgeon, if any attending? None.
- (19) First aid given, by whom? F. C. Hinman.
- (20) Sent or taken to Hospital? Yes.
- (21) Has he returned to work? Yes. If so, when? May 16th, 1919. Off 7 days only—May 8th to 15th, inclusive.
- (22) Did the injured employee ever give notice of any defect in ways, work or apparatus

connected with accident, and if so, was such defect remedied?

- (23) Did the injured person make any statement after the accident as to its cause, or admitting his carelessness, and if so, what did he say, and who heard his statement?

(Stamped): Deft. Exhibit No. 2, offered for Identification. Case No. L-151. C. R. M.

Defendant's Exhibit No. 2. Admitted and Filed Aug. 8, 1924. C. R. McFall, Clerk. Case No. L-151. Gomez vs. S. W. Metals.

(See over) [18]

(Reverse side.)

THE ACCIDENT.

Date: May 8th, 1919. Hour: 2:30 A. M. Place:
1045 Stope.

- (25) What light was there at the time and place of the accident? Carbide lamps.
- (26) Name of the Foreman in charge, and what was he doing? Frank Chamis—Shift Boss.
- (27) Names and addresses of all persons who witnessed the accident, or claim to have witnessed it, or who would probably know anything about it:
- (28) Was the injury due to want of care on the part of the injured person, or negligence of any other person; if so, whom?
- (29) Explain how the accident happened, its cause, etc. If necessary, illustrate by

Southwest Metals Company

rough sketch: Hit in left eye by piece of flying rock.

J. L. WHITE,
Supt.
(Position.)

No. L-151—PRESCOTT.

FRANCISCO GOMEZ,

Plaintiff,

Against

SOUTHWEST METALS COMPANY, a Corporation,
tion,

Defendant.

VERDICT.

We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff and assess his damages at One Thousand Dollars.

E. C. SUMAN,
Foreman.

[Endorsed]: Filed August 8, 1924. C. R. McFall, Clerk. [19]

Regular March, 1924, Term, at Prescott.

In the United States District Court in and for the
District of Arizona.

Honorable F. C. JACOBS, United States District
Judge, Presiding.

(Minute Entry of Friday, August 8th, 1924.)

No. L-151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corpora-
tion,

Defendant.

MINUTES OF COURT—AUGUST 8, 1924—
JUDGMENT.

This cause having come on regularly for trial on the 7th day of August, 1924, the plaintiff appearing in person and by his counsel, D. A. Fraser, Esq., and I. A. Jennings, Esq., and the defendant appearing by its counsel, Leroy Anderson, Esq., and A. H. Gale, Esq., and a jury of twelve men having been duly empaneled, and evidence having been submitted to the jury both by the plaintiff and the defendant, and thereupon the cause having been argued and submitted to the jury for its consideration, and the jury having returned a verdict in favor of the plaintiff and assessing his damages

at \$1,000.00, now after due consideration and the Court being fully advised in the premises:

IT IS ORDERED, ADJUDGED AND DECREED that, pursuant to the verdict herein returned, the plaintiff, Francisco Gomez, do have and recover of and from the defendant, Southwest Metals Company, a corporation, the sum of One Thousand Dollars (\$1,000.00), together with his costs herein sustained taxed at the sum of Eighty Dollars and Seventy cents (\$80.70) [20]

Regular March, 1924, Term, at Prescott.

In the United States District Court in and for the
District of Arizona.

Honorable F. C. JACOBS, United States District
Judge, Presiding.

(Minute Entry of Tuesday, August 12, 1924.)

No. L-151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corpora-
tion,

Defendant.

MINUTES OF COURT—AUGUST 12, 1924—
ORDER EXTENDING TIME TO FILE
BILL OF EXCEPTIONS.

Comes now the defendant, Southwest Metals Company, by and through its counsel, LeRoy Anderson, Esq., and on motion of said counsel,

IT IS ORDERED BY THE COURT that time to file bill of exceptions herein be extended fifty (50) days in addition to the 10 days allowed by law, or sixty (60) days after August 9th, 1924.

[21]

In the District Court of the United States in and
for the District of Arizona.

No. L-151—PRESCOTT.

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corpora-
tion,

Defendant.

MOTION FOR NEW TRIAL.

Comes now the defendant above named and moves the Court for an order setting aside the verdict returned by the jury in the above-entitled cause and to grant to this defendant a new trial, for the following causes materially affecting the substantial rights of this defendant:

I.

That the Court erred in overruling defendant's demurrer to the complaint herein.

II.

That the Court erred in overruling defendant's motion for a directed verdict, made at the close of plaintiff's case and renewed at the close of all of the evidence.

III.

That the law, upon which said complaint and cause of action, is based, to wit: The Employer's Liability Law, of the State of Arizona, is unconstitutional and void, as being in violation of the Fourteenth Amendment of the Constitution of the United States.

IV.

That the plaintiff failed to prove all of the material allegations of his complaint.

V.

That the verdict is contrary to the law and the evidence. [22]

VI.

That the evidence shows without conflict that the plaintiff was not injured, as alleged in his complaint, or otherwise, or at all, while in the employ of the defendant.

VII.

That the evidence shows without conflict that the plaintiff's injuries were received prior to the time complained of.

VIII.

That the verdict is contrary to the law and the evidence and has no support in the evidence.

That there is no evidence that will support a verdict for One Thousand Dollars (\$1,000.00); that said verdict should either have been for the defendant, or an amount in excess of the amount returned.

IX.

That the jury disregarded the instructions of the Court in arriving at its verdict, and that said verdict is not compensatory, as defined and set forth in the instructions of the Court.

X.

Error of the Court in refusing and admitting evidence.

XI.

Errors in law occurring at the trial.

Abuse of discretion on the part of the Court, by which the defendant was prevented from having a fair trial.

Insufficiency of the evidence to justify the verdict.

Said errors in law being as follows:

1. Overruling of demurrer to amended complaint.
2. Overruling of our objection to the introduction of any evidence on behalf of the plaintiff at the opening of the case.
3. Error in refusing to direct a verdict at the close of plaintiff's case, and refusing to direct a verdict [23] at the close of all the evidence.

4. In sustaining an objection to the defendant's cross-examination of Dr. Bakes.

5. In refusing to permit defendant to show said witness' interest, bias and prejudice in the case.

6. In sustaining objections to defendant's offer to show that Dr. Buck was appointed under the statute, under the law of Arizona, permitting such examinations of plaintiffs, by disinterested physicians.

7. In refusing to permit Dr. Franklin to testify on the ground that his testimony was not privileged and (second) on the ground that plaintiff had made statements as to what the doctor did, and that the doctor, even though the privilege were claimed, had a right to testify in contradiction of the statement of plaintiff, that he took nothing from said eye, irrespective of the proposition as to any treatment that the physician gave to the plaintiff, or as to any testimony concerning the condition of said eye.

XII.

The Court erred in refusing to permit the nurse to testify, she being present at the time the first examination of said eye was made, and was able and willing to testify to the condition of the same and to the treatment given, said nurse not being within the statute, and her evidence not being privileged.

XIII.

The Court erred in sustaining an objection to the evidence offered by Dr. Vivian and Gatterdam,

and abused his discretion in refusing to permit Dr. Vivian and Gatterdam to answer the hypothetical question based upon the testimony of Dr. Buck and Mr. Culp; said error being particularly manifest on account of the fact that plaintiff had claimed his privilege to prevent the attending physicians from testifying as to the condition of the eye when plaintiff reported to the hospital, and in further view of the fact that plaintiff had secured another physician to testify for and on his own behalf as to the present condition of said eye. [24]

XIV.

That the Court erred in refusing to permit defendant to prove, or offer evidence in support thereof, that plaintiff had accepted full settlement and signed a release for a previous injury to said left eye, and in refusing to permit Dr. Vivian to testify that he had operated, previously, upon said plaintiff's left eye; that the evidence of Dr. Vivian was offered to show that the operation was performed, and not to show the nature and character of said operation, the fact of the operation not being privileged, particularly in view of the fact that plaintiff had testified concerning said operation.

XV.

Said evidence is insufficient in the following particulars:

That there was no evidence to support a verdict for One Thousand Dollars (\$1,000.00).

That the evidence tended to prove either of the following:

1. That the plaintiff was not entitled to recover any damage; and

2. If entitled to recover, more than One Thousand Dollars (\$1,000.00).

That the loss of the eye, if defendant was responsible for the same, could not be compensated for in the sum of One Thousand Dollars (\$1,000.00).

That there is a fatal variance between the allegations of the complaint, and the proof;

That there is no evidence tending to show that the infection was a result of the injury or that the infection caused the loss of the eye, and there is no evidence tending to show that the injury complained of caused the loss of said eye.

WHEREFORE, defendant prays that said verdict and judgment as rendered thereon, be set aside and a new trial granted herein.

ANDERSON, GALE & NILSSON,
Attorneys for Defendant.

I hereby consent to filing of the within motion.

F. C. JACOBS,
U. S. Dist. Judge.

[Endorsed]: Motion for New Trial. Filed August 12, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy. [25]

In the District Court of the United States in and
for the District of Arizona.

No. L-151.

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corpora-
tion,

Defendant.

BILL OF EXCEPTIONS.

BE IT REMEMBERED that heretofore, to wit,
on the 7th day of August, 1924, the above-entitled
case came on for trial at Prescott, Arizona, upon
the issues joined herein, before the Honorable F. C.
Jacobs, Judge of the United States District Court,
in and for the District of Arizona, sitting in the City
of Prescott, Yavapai County, Arizona.

A jury was duly empaneled and sworn and there-
upon the respective parties offered and introduced
the following evidence and exhibits of evidence and
the following evidence and offers of evidence were
rejected and objections and motions were made and
rulings of the Court entered and exceptions duly
taken by the parties as follows, to wit:

APPEARANCES:

D. A. FRASER, Esq., and Messrs. JENNINGS and STROUSE for the Plaintiff, and Messrs. ANDERSON, GALE & NILSSON, for the Defendant. [26]

PLAINTIFF'S EVIDENCE IN CHIEF.

(Page 4, Transcript of Evidence.)

TESTIMONY OF FRANCISCO GOMEZ, ON HIS OWN BEHALF.

FRANCISCO GOMEZ, plaintiff, a witness on his own behalf, being first duly sworn through the Interpreter, GREGORIO B. RUIZ, testified as follows:

Direct Examination by Mr. JENNINGS.

My name is Francisco Gomez. I am the plaintiff in this case.

Thereupon the defendant made the following objection to the introduction of any evidence:

Mr. ANDERSON.—Under Chapter 5, known as the Employers' Liability Law of the state. Said amended complaint does not state a cause of action against the defendant, because he expressly alleges that it is brought under said act, section 3158, of said act being the clause of the statute which gives the right, if any, under this law.

My specific objection is this, your Honor. In paragraph 3 of the amended complaint, they allege that plaintiff on said date was employed and at work as a minor in one of said defendant's mines

(Testimony of Francisco Gomez.)

known as the Blue Bell Mine, and on the twelve hundred foot level thereof, in stope No. 40, and in the usual course of his employment, was picking rock with a bar, when a small piece of rock, dust or debris dropped from the roof of said stope, striking the plaintiff in the left eye, injuring said left eye. My first objection is that it is not specific enough in alleging what struck the eye. I will say, incidentally, however, that I am not relying upon that. I don't think it is good pleading and I think it is objectionable, but what I think is the fatal objection to this complaint follows. I want your Honor to notice that they say injuring said left eye and there is a semicolon; "That as a result of said injury to said [27] eye and without fault on the part of this plaintiff, the said eye became infected and the plaintiff's vision in his said left eye was permanently and totally destroyed."

The COURT.—They claim it is not the injury, but the infection.

Mr. ANDERSON.—That is the point exactly. The law provided that we are responsible, other things bringing us within the law, for an accident which results in injury or death, and we are liable only for the accident.

The objection to the introduction of evidence was overruled and an EXCEPTION was requested and allowed. (Page 6, Transcript of Evidence.)

(Testimony of Francisco Gomez.)

FRANCISCO GOMEZ, the plaintiff, thereupon was recalled to the stand.

On June 13th, 1923, I was working for the Southwest Metals Company at the Blue Bell Mine, near Mayer, Arizona. I first went to work for the Company in 1918. I worked about two (2) years and quit in 1920. I went back to work there in January, 1923, as a mucker. On June 13, 1923, I was working as a machine man on the twelve hundred foot level and the 40 stope. The shift went on at 7:30 in the evening and came off at 3:30 in the morning. My wages were about \$5.12. My duties were drilling with this machine.

The place where I was standing was about thirty feet above the floor of the level and the roof was about eight feet from the ground upon which I was standing. My duties were to drill, blast, and then trim the face of the roof so as to have no loose hanging rock there. I blasted at 11:30. After the blasting I went to pick the roof to make it solid, that is when I got hurt. It is necessary to pick the roof because loose rock might fall. I had a partner who was giving me light with his lamp. I was using a pick. When I picked at the rock that was [28] above, the piece of rock flew and hit me in the eye. My partner's name was Francisco Lopez.

I had been working as a machine-man for about five months. I had picked rock down from the roof all of the time. I know how I should do that and on June 13th did it the same as I always did. My partner saw the rock hit me in the eye and then

(Testimony of Francisco Gomez.)

I told him my eye was hurt and he came over and cleaned my eye. I was struck in the eye about 1:30 in the morning. After that I went down to the level to get out, but I could not get a skip at the time, so I waited around till the shift went off at 3:30. When I got on top to report hurting my eye I told the shift boss I was hurt. I waited for him about fifteen minutes. I did not see the foreman, and then went to my house and washed my eye with water. Next morning I went to the office where they doctored me. They took some dirt out of my eye with a stick with some cotton wrapped up around it. This was at the Blue Bell Mine. The next day they sent me to the hospital at Humboldt. I was discharged from the hospital July 18.

I am forty-three years old. I have never been sick during the last eight or ten years. There was nothing wrong with my eyes before I was hurt on June 13th at the Blue Bell Mine. I could see perfectly. I was struck right in the middle of the left eye. It interfered with my vision and caused me pain. Now I have a cloud in the eye and it has been that way ever since I was hurt at Blue Bell. I cannot see out of that eye. It is clouded. All I can see is cloudy. The loss of vision interfered with my work. I paid hospital fees of 1.50 a month, which were deducted from my wages.

Cross-examination by Mr. ANDERSON.

(Page 15—Transcript of Evidence.)

Since June 13th, 1923, I have been working for

(Testimony of Francisco Gomez.)

the [29] United Verde Copper Company at Clarkdale. I have been blasting chutes. The second time I have been working there since May 21, 1924. The first time I went to work there, September 5, 1923. I was injured in June, 1923, and went to work for the United Verde Copper Company in September following. I received full wages all of the time I was at Clarkdale. The first time, \$3.63, the second time \$3.85. I lost some time over there on account of my eye.

Before I went to work on May 22, I was examined by the doctor of the United Verde Copper Company. I told them that I had good sight. I did not tell them I could see absolutely normal out of the left eye. I was examined by the doctor of the United Verde Copper Company and was passed and put to work. The doctor gave me a card like the one you show me and I took the card down to the Company office and went to work. I have been working for them up until last Saturday drawing the regular wages of \$3.85 a day.

Mr. ANDERSON.—Q. Did the doctor give you certain cards to read with one eye and then the other when you were examined to go to work for the Copper Company?

Mr. JENNINGS.—Objected to as a privileged communication between doctor and patient.

The objection was overruled and EXCEPTION asked for and allowed. (Page 18, Transcript of Evidence.)

(Testimony of Francisco Gomez.)

WITNESS.—He gave me some little black balls like that (indicating). There were some black dots on the wall and I had to count them. I did not tell them I was an able-bodied man because they did not ask me. They took my clothes off and examined me all over before they gave me the card to go to work, and I have been working ever since.

I did say that I never had any trouble with my left eye [30] before June 13, 1923. I had it hurt before; yes, sir. I don't recall if it was in May of 1919, but I remember that some oil got in my eye. I don't recollect that in May, 1922, I claimed that a piece of rock hit me in the eye. I told Dr. Vivian, who was in charge of the hospital at that time that the piece of rock hit me in the left eye. I was in the hospital, but it was oil with dirt in it, not a rock, metal dirt. I received compensation for the injuries. It was not the left eye, it was both eyes at that time. I was working at the Blue Bell Mine in May, 1919. I was hurt June 13, 1923, and went down to the hospital, where Dr. Franklin treated me. There was a nurse there at the time.

I did not work from the 13th of June until the 5th of September, and never worked at Blue Bell any more. The rock was about an inch and one-half or something like that. I do not know how much got into my eye because I shut it as soon as I received the lick. My partner cleaned my eye a little on the outside. His name is Francisco Lopez. I have talked with him about the case and I have talked with my lawyers.

(Testimony of Francisco Gomez.)

Yes, I said that Dr. Franklin took some dirt out of my eye at the hospital and there was a nurse with him at the time he examined my eye.

No, I cannot see as well now as I could on June 1, 1923. I have not had sore eyes during the last two or three years. I reported several times to the first aid station at Blue Bell when dirt fell in my eye.

I did not talk with Mr. Swiney. I reported that my eye was hurt to Mr. Davis, Mr. Bagley, and the Surveyor. I did not go back to Blue Bell to work as a mucker from August, 1923, to January, 1924, and never went back to work at the Blue Bell again. My shift boss was Swiney. At the time I was a miner [31] Lopez was a miner and there were several muckers but they were not there at the time.

Since I left the Blue Bell, in addition to working at the United Verde Copper Company, I worked twenty-six days at the Copper Chief as a mucker. My pay was 5.00.

I know Dr. Vivian; he is the doctor that looked after my eyes in May, 1919, and operated. It was my two eyes, both the right one and the left one.

Redirect Examination by Mr. JENNINGS.

After Dr. Vivian treated my eyes in 1919, they got all right. I could see just the same as if I never had anything happen to my eyes. Oil splashed into both eyes from a machine. It is the duty of the miner or machine man to bar down the roof after the blast.

(Testimony of Francisco Gomez.)

Recross-examination by Mr. ANDERSON.

Mr. Anderson handed the witness a card marked for identification as Defendant's Exhibit No. 1.

WITNESS.—I don't know whether this is the same card that the doctor at the United Verde Copper Company gave me after he examined me. I do not know whether it is my mark on the back, "I can't say it ain't." I worked at the mill. It is on top of the ground.

TESTIMONY OF FRANCISCO LOPEZ, FOR
PLAINTIFF.

FRANCISCO LOPEZ, being called as a witness on behalf of the plaintiff and first duly sworn, through Interpreter, Gregorio B. Ruiz, testified as follows:

Direct Examination by Mr. JENNINGS.

(Page 33, of Transcript of Evidence.)

My name is Francisco Lopez. I live at Clemenceau, Arizona, where I work at the smelter. I have known the plaintiff three or four years. I have been employed at the Blue Bell [32] Mine. I first knew the plaintiff at the Blue Bell Mine in 1918 or 1919. At that time I worked there four months.

I was working at the Blue Bell Mine in June, 1923. On June 13, 1923, I was working on the 1200 foot level in Stope No. 40. The plaintiff here was working there with me. I was a miner. It was our duty to scrape the ceiling, so that when the

(Testimony of Francisco Lopez.) .

muckers would come in, or other workmen, nothing would fall on them. We would also blast. We came on shift at 7:30 and went off at 3:30 in the morning. The plaintiff blasted at a half of the shift. I did not. After the blast the plaintiff took a bar and scraped the ceiling up above and a piece of rock hit him in the eye. I was holding the light so he could scrape the ceiling. From where we were standing to the floor was about thirty feet. When the rock hit him in the eye he said, "I hurt myself. The rock struck me in the eye." I saw the rock strike him and immediately I took dirt away from his eye there and his eye was red. I did not take any dirt from the inside of the eye. I just cleaned the outside of the eye. Gomez then went down to the level—that was about 1:30 in the morning. He did not come back to work again and I next saw him in the station as we were going off shift. When we got to the top I went home and he went to see the foreman.

Cross-examination by Mr. ANDERSON.

(Page 37 of Transcript of Evidence.)

Gomez and I are friends. I met him at Blue Bell and over at the Smelter at Clemenceau. We talked the case over because he told me I would have to be a witness. I have no interest in the case. I did not take any dirt out of his eye. I wiped the outside of his eye because I did not want to bother the inside of the eye. It was watering. His eye was red at the time I saw it and there was lots of water

(Testimony of Francisco Lopez.)

coming out of the [33] eye. It was red the minute that I saw him. It was red immediately. I saw the eye within one minute after it was hurt. It was red and water coming out of it. Before that time I had seen his eye and saw that he could see all right. The orders were that if a man was injured he should go to the first aid station immediately. They treated them there whether they were diseased or injured. Gomez quit work as soon as he was hurt. I continued working. At the time Gomez was hurt, he and I were there alone—the others were down at the level eating their supper.

(Thereupon, because of the absence of the plaintiff's medical witness, it was stipulated that the defendant should proceed to put in evidence, reserving to the defendant the right to make any motions required at the close of the plaintiff's case.)

DEFENDANT'S EVIDENCE.

(Page 43 of Transcript of Evidence.)

TESTIMONY OF DOCTOR ROBERT T. FRANKLIN, FOR DEFENDANT.

DR. ROBERT T. FRANKLIN, a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. ANDERSON.

My name is Robert T. Franklin. I am a regularly licensed and practicing physician and surgeon in Arizona. I was employed as a physician by the Southwest Metals Company from June 1, 1922, until

(Testimony of Doctor Robert T. Franklin.)

February, 1924. I have seen the plaintiff around the mine and at the hospital. I have a record of treating him in June, 1923.

Questions on the *voir dire* by Mr. JENNINGS.

I was regularly employed by the Southwest Metals Company at the time I treated Gomez, and it was in the regular course of my medical employment that I treated him. All of [34] the employees of the company paid \$1.50 a month for hospital fees.

WITNESS.—I recall treating this plaintiff in June, 1923. I have a record of the treatment.

Mr. Jennings objected to any other evidence, claiming the privilege of the relation of physician and patient. The objection was sustained.

Mr. ANDERSON.—Q. You heard his testimony here while he was on the stand, stating that he came to the hospital where you were? A. Yes, sir.

Q. And you heard him state that you took some dirt out of his eye?

Now, I ask you, Doctor, did you or did you not remove any dirt from his eye on that occasion?

Objections by Mr. Jennings on the ground of relation of physician and patient.

Mr. ANDERSON.—If the Court please, that is not privileged. That is a statement of fact as to what the doctor did. Now, I am not asking him as to any treatment he made of anything that he did. The patient discloses and makes a statement of what the doctor did. Now, I have a right to ask him whether or not he did that particular thing or not.

(Testimony of Doctor Robert T. Franklin.)

The COURT.—There might be some exceptions, and there are some exceptions, but this you will note is calling for a statement from this physician as to what he discovered by his examination of the patient, and using that for the purpose of impeachment.

Mr. ANDERSON.—Well, if that is the way my question was asked I will withdraw my question.

The COURT.—Yes, that is the effect of the question. The objection is sustained. Exception allowed.

TESTIMONY OF DOCTOR CHARLES S.
VIVIAN, FOR DEFENDANT.

Dr. CHARLES S. VIVIAN, a witness on behalf of the defendant, and first duly sworn, testified as follows:

Direct Examination by Mr. ANDERSON.

(Page 47 of Transcript of Evidence.)

My name is Charles S. Vivian. I am a physician and [35] surgeon. I am a regularly licensed and practicing physician in Arizona. I was formerly associated with the Consolidated Smelting Company, the predecessor of the Southwest Metals Company. I know the plaintiff, Francisco Gomez. Refreshing my recollection from record, I know that I treated the plaintiff in May of 1919.

Mr. ANDERSON.—We admit that the relation of patient and physician existed at that time; that

(Testimony of Doctor Charles S. Vivian.)
he was in the same position occupied by Dr. Franklin later.

Mr. JENNINGS objected on the ground that the relation of patient and physician existing between the witness and the plaintiff. The objection was sustained.

Mr. ANDERSON.—I want to ask the same question, your Honor, that I did of the other doctor.

Q. Did you treat both of his eyes at that time?

Mr. JENNINGS.—Same objections.

Mr. ANDERSON.—I ask it not to violate the privilege but in contradiction of the statement made by the plaintiff.

Objection sustained. An EXCEPTION requested and granted. (Page 48, Transcript of Evidence.)

TESTIMONY OF DOCTOR ROBERT C. BUCK, FOR DEFENDANT.

Dr. ROBERT C. BUCK, being called as a witness on behalf of the defendant and first duly sworn, testified as follows:

Direct Examination by Mr. ANDERSON.

(Page 49, of Transcript of Evidence.)

My name is Robert C. Buck. I am a regularly licensed and practicing physician in the State of Arizona. I am, at the present time, associated with the United States Veterans Bureau, specializing in eye, ear, nose and throat. I have examined the plaintiff. I am not employed by either the South-

(Testimony of Doctor Robert C. Buck.)

west Metals Company or the plaintiff. I examined plaintiff's eyes on July [36] 5th, of this year. I have made a specialty of the eye about twelve or thirteen years. From my examination of plaintiff's left eye and from my professional experience, I think I can express an opinion as to the cause of the condition that now exists in that eye.

Mr. JENNINGS then objected to the opinion of the witness if based upon any history of the case, received from anyone else.

WITNESS.—I think that I can state my opinion without taking into consideration the history of the case, basing my opinion solely on my examination. There is an opacity in the cornea of the left eye, which appears to me to be in the body of the cornea and such opacities come from a disease that we call interstitial ceratitis, which is practically always due to a specific infection. This is not evidence of an internal injury, but is an inflammatory condition in the substance of the cornea from this disease.

No evidence of an outside injury appeared to me. I examined that opacity very carefully, and it did not look to me like a superficial scar. The surface of the cornea was smooth and, so far as I could see, no irregularities in it. I threw a tiny spot of light on the cornea and moved it about over the cornea and, if that had struck an irregular part of the surface of the cornea, the form of the light would have been destroyed by the irregularity in the cornea but it was the same over the opacity and over the rest of the cornea. If there had been a cut on the outer

(Testimony of Doctor Robert C. Buck.)

part of the eye, a scar would have been left there and I would have seen it. The condition I found was in the body of the cornea below the surface and probably occasioned by syphilis, as it usually is—practically always in those cases. [37]

I had a history in connection with this case. I secured it from the Wasserman test. I saw the blood taken. The test was made under my direction and by my order. I was not present when the test was made, but the test was made under my order and by my direction, and I received the result of the analysis.

Q. What was the result of the analysis?

Question objected to.

Objection sustained. An EXCEPTION was requested and granted. (Page 56, Transcript of Evidence.)

The only evidence of any external injury that I found was a tiny spot on the lower lid, perhaps a little scar, not noticeable at all. Well, all I can say is that the condition at present is an opacity in the cornea. That opacity appears to me to be interstitial—not on the surface of the cornea—and, therefore, due to an interstitial ceratitis inflammation of the cornea—an inflammation of the parenchyma or body of the cornea rather than a scar from an external injury to the cornea and those cases of interstitial ceratitis are practically always, I believe, due to syphilis, either inherited or acquired.

The blood test was made by Dean Culp, the laboratory technician, out at the hospital. The

(Testimony of Doctor Robert C. Buck.)

Wasserman test is a blood test for syphilis—the various degrees of the test are the negative, where there is no syphilis, but they have two plus, three plus and four plus; and sometimes we get a report back—four plus strongly positive. Sometimes if we get two plus you would not be absolutely sure there was syphilis, but if it is four plus, we feel pretty sure that it is syphilis. If it is four plus, strongly positive, we feel a little more certain. If we get a negative, the rule is to take either one or two more tests, or test the spinal fluid. [38]

Cross-examination by Mr. JENNINGS.

(Page 60, of Transcript of Evidence.)

(Witness goes to blackboard and draws picture of eye.) This would be the iris and this the pupil. It is understood, of course, that the pupil is simply the opening through the iris and, while it looks black to us, it is because we are looking into a dark chamber. Now, the scar would come about like this (drawing) about the same size as a normal pupil—this pupil is about the same size as the normal pupil, only a little below the center, so that there is a crescent behind the top of the opacity. A scar is an opacity but an opacity may not be a scar. In this case, I should call it an opacity; it has the effect of the patient looking through something slightly cloudy—perhaps, slightly cloudy glass. The opacity is a very light gray—bluish gray. In some cases it may be thicker than others. If it becomes thick enough, then the patient will hardly be able to see thru it

(Testimony of Doctor Robert C. Buck.)

at all. If there is an injury to the eye, it will absorb the same as a scar on the hand. If it was a severe injury, you would not get the absorption that you would, I think, from ceratitis. The scar is not on the outside of the cornea, not on the inside of the cornea, but in the body of the cornea itself. To determine whether or not there is a scar on the outside of the cornea. It takes very careful examination—very close examination and possibly sometimes you could not tell definitely but, by passing that spot of light over the cornea, as we did this man, and getting no change in the refraction of the light—no distortion in that little beam of light, makes me feel that it is in the body of the cornea rather than on the surface. The opacity is caused by the infiltration of the tissue of the cornea. Infiltration means there is an irritation there that causes the blood to come in the blood cells and blood [39] serum and there is cloudyness takes place from that condition. There might possibly be a condition similar to pus. We don't usually get actual pus in interstitial ceratitis. It is not the breaking of the blood vessels, but it is more of an proliferation of the blood vessels in the diseased part. I don't know how many cases of interstitial ceratitis in the past twelve years I have treated. I have read a number of authorities on the diseases of the eye. A true interstitial ceratitis, I believe, is, in the majority of cases, due to syphilis.

The condition of the plaintiff's eye appears to me to be an opacity that would result from an inter-

(Testimony of Doctor Robert C. Buck.)

stitial ceratitis. It looks more like that to me than a superficial scar or scar from superficial ulcer.

Using the Snelling test card, the standard test card, with the patient sitting twenty feet from it—with the right eye read 20/20, which is normal, and with the left eye, he read 20/100. That is he saw at twenty feet what he should have seen at one hundred. I do not know whether 22/100 is occupational blindness. I do not think there will be much change in the condition of the plaintiff's eye in the future.

The Wasserman test is not considered by all authorities as an infallible test. If I got a strong four plus positive, the first time, I should certainly go ahead and treat the patient for syphilitic condition without waiting for any other test. After getting a strong four plus, I don't believe I would make a test of the spinal fluid.

Redirect Examination by Mr. ANDERSON.

(Page 71, of Transcript of Evidence.)

I don't think there is any treatment in the eye indicated now. There is an opacity there which I do not think anything will effect in the way of treatment. [40]

TESTIMONY OF MRS. TESSIE M. BENEDICT,
FOR DEFENDANT.

My name is Tessie M. Benedict; I am nurse. I was working for the Southwest Metals Company in June, 1923. I was working under the supervision

(Testimony of Mrs. Tessie M. Benedict.)

of Dr. Franklin. I recall the plaintiff, and I assisted in treating him when he was in the hospital in June, 1923. I was acting under the direction of Dr. Franklin while I was working at the hospital. I was his assistant.

Question by Mr. ANDERSON.—Do you recall what treatment was made of his eye at that time?

Mr. JENNINGS.—Now, just a moment; I object.

Mr. ANDERSON.—I will admit that she was a nurse at the hospital of the defendant company, acting through and by and under the orders of the physician in charge of the company, and that the relation of physician and patient existed between Dr. Franklin, but that she is simply a nurse and not a professional—not a physician or surgeon.

Mr. JENNINGS.—I object to it on the ground that the communication or information she gained at any examination, or by seeing the plaintiff there is privileged on the ground that she is the agent of the doctor, and certainly an agent cannot make disclosures of the physician's records that he could not make himself. He is asking for what treatment was given.

The COURT.—The question is now—what treatment was given?

Mr. JENNINGS.—Yes, sir.

The COURT.—That is calling for treatment by the physician?

Mr. JENNINGS.—Yes.

The COURT.—The objection is sustained.

Mr. ANDERSON.—Upon the ground may I inquire—

Mr. JENNINGS.—I objected to it on the ground that it was a privileged communication.

The COURT.—The record shows that this lady is or was the assistant to the physician.

Mr. ANDERSON.—She was a trained nurse.

The COURT.—Trained nurse regularly employed in the hospital, and assisting the physician, and under his direction, and she is called to testify as to the treatment by the physician? Objection is sustained.

Mr. ANDERSON.—I offer to prove by her what treatment was made, and her observations, and what she knows independent of the physician by reason of her capacity as a nurse. My contention is not within the statute, and may I have an exception?

The COURT.—Yes. [41]

RESUMPTION OF DEFENDANT'S CASE.

TESTIMONY OF DR. EDWIN C. BAKES, FOR DEFENDANT.

Dr. EDWIN C. BAKES, a witness for the defendant, being first duly sworn, testifies as follows:

Direct Examination by Mr. JENNINGS.

(Page 76, Transcript of Evidence.)

My name is Edwin C. Bakes. I reside in Phoenix, Arizona. I am a physician and surgeon. I have practiced since 1909. I have specialized in eye, ear, nose and throat, since 1913, at Phoenix.

(Testimony of Doctor Edwin C. Bakes.)

I have examined the plaintiff, Francisco Gomez; my first examination was July 23, 1923. The last examination was August 4, 1924. I made an eye examination. I found a corneal scar on the center of the cornea, of the left eye, almost completely filling the pupillary area. I discovered this on my first examination, July 23, 1923. From my examination the scar was not over six months old, I would say. I determined that the scar was recent, from the appearances of the scar itself, in that when a scar is recent, the edges of it are thinned out and feathered, so there isn't the abrupt leaving off of the scar into the normal tissue. The line of demarcation is thinned or feathered. When the scar becomes old, that line becomes very marked. There is a distinct beginning of scar and ending of corneal tissue—clear corneal tissue. It indicates that there had been a sore or ulcer on the cornea. The scar was on the outside surface of the cornea. This was apparent in my examination on July 23, 1923. I was able to tell by oblique illumination and viewing the cornea from the side. You could see normal corneal tissues underneath the scar that shows on the surface. Corneal ulcers are caused by infection, and corneal injury followed by infection. If a small piece of rock struck a [42] person in the eye that would be sufficient cause for a corneal ulcer. Any scratch or injury to the cornea may be followed by a corneal ulcer.

(The witness went to the blackboard to the draw-

(Testimony of Doctor Edwin C. Bakes.)

ing made thereon by Dr. Buck and stated as follows:)

This ring around here fairly accurately represents the limits of the corneal scar. It would be better represented if this was widened a little, so that it will show the effect of the scar. That scar is white like the illustration here and, of course, being more or less opaque, prevents the light or image entering the eye. That is the way it effects the vision.

From the test I made of the vision of his left eye I found it was 20/100. I discovered this at both my first and second examinations. The condition is permanent.

Q. Do you know what the term occupation or industrial blindness is? A. Yes, sir.

Q. What is the term?

Mr. ANDERSON.—Object to. It is immaterial and irrelevant.

The COURT.—Objection is overruled.

Mr. ANDERSON.—There is nothing in the pleadings, your Honor—no issue as to industrial blindness. There is total blindness alleged here. There is nothing in our statute that talks about industrial blindness or occupational blindness.

The COURT.—Proceed.

An EXCEPTION was requested and allowed. (Page 82, Transcript of Evidence.)

WITNESS.—It is considered that vision less than 20/70 constitutes occupational blindness. This is a condition in which the individual who has a total

(Testimony of Doctor Edwin C. Bakes.)

blindness of 20/70 is incapacitated [43] in a great many ways, as far as work is concerned, that is, doing accurate work—that is, if a person has only 20/70 vision. In both eyes he would be occupationally blind. The plaintiff is occupationally blind in the left eye.

Interstitial ceratitis is a disease of the substance of the cornea. It affects practically the whole of the cornea and occurs early in life, usually before the fifteenth year and is due to inherited syphilis. I have observed many cases of it. I have never seen a case of interstitial ceratitis in an adult as the result of acquired syphilis, and I have seen in my experience thousands of cases of acquired syphilis.

Interstitial ceratitis would not produce a cornea ulcer on the surface of the cornea. It is my opinion that the condition of plaintiff's eye was due to a corneal ulcer, produced from external causes.

Cross-examination by Mr. ANDERSON.

(Page 83, Transcript of Evidence.)

I was employed to appear here by the plaintiff's attorney.

Q. You make it a habit of appearing for the plaintiff in these personal cases.

Objected to as immaterial.

Mr. ANDERSON.—I want to show the interest of the witness, your Honor.

Objection sustained. EXCEPTION requested and allowed. (Page 84, Transcript of Evidence.)

WITNESS.—I have never made a Wasserman

(Testimony of Doctor Edwin C. Bakes.)

test of the plaintiff. I did not make an examination of him or make any observation for syphilis. Interstitial ceratitis is produced entirely from inherited syphilis. All of the books on eye diseases will tell you that interstitial ceratitis is an inherited syphilis disease. [44]

Even though I found the condition which I did in the plaintiff's eye on August 4th, and had taken a Wasserman test which showed four plus positive, I would know that his condition was not due to syphilis. Syphilis had absolutely nothing to do with it. His condition is an ulcerative ceratitis. Even though there was no abrasion from the outside, I would think that he had an ulcerative ceratitis just the same. This would come from the outside.

In speaking of occupational blindness, I referred to ordinary labor. I think plaintiff could work with the vision in his right eye although his judgment of distances and things of that sort, with the low vision of his left eye, would not be very accurate.

The condition which I found in the plaintiff's eye was all of recent origin—within six months of the time of my examination. It had no connection with an injury plaintiff received in 1919. There was some evidence of a pterygium having been done. This refers to a growth at the inner angle of the eye. If I remember correctly, it appeared in both eyes. I do not know when this was done. I was only interested in the corneal scar. I think that the

(Testimony of Doctor Edwin C. Bâkes.)

cases of a patient having interstitial ceratitis on account of acquired syphilis, would be very, very rare. I have never seen one.

The scar which I found, when he is in ordinary light practically covers his entire pupil area. Probably two or three millimeters. It is practically round in contour. I cannot say what caused the ulcer, but it was not occasioned by syphilis—I am absolutely sure of that. It could have been the result of gonorrhœal infection of the eye. If there had been no infection, the scratch upon the eye would not have left any effect, or practically none. [45]

After a cut the eye would probably become inflamed within twelve to twenty-four hours, depending entirely upon the magnitude of the cut. The redness would not come with the injury—it would take a few minutes at least for it to become red. A small scratch would cause very little congestion within a reasonable time.

Redirect Examination by Mr. JENNINGS.

(Page 96, Transcript of Evidence.)

In an interstitial ceratitis, you find the cornea, practically all of it, very hazy. When you examine it closely, you will find little areas where the haziness is more pronounced than others. Ordinarily, it is not in one spot, but in the whole eye, and both eyes are affected. Under ground, ordinarily, the cause of infection is pneumococcus.

(Testimony of Doctor Edwin C. Baker)

Redirect Examination by Mr. JENNINGS.

(Page 98 of Transcript of Evidence.)

If a man were struck in the eye with a rock, it would be red within a very short time. Immediately would be probably too soon, but within the next few minutes he would have a redness of the eye.

Thereupon the plaintiff rests with the stipulation that the mortality tables may be introduced.

Mr. ANDERSON.—If the Court please, I desire to preserve my record upon the question that I annoyed your Honor with yesterday and I move at this time for a directed verdict upon the grounds set forth in my demurrer and for the grounds set forth in the objection that I made to the introduction of any evidence yesterday and I make the same a part of this motion and upon the further ground that there is no evidence tending to prove the allegations of the complaint, as this cause has finally gone to trial and that there is a variance between the allegations and [46] the proof in support of it and ask that the—

The COURT.—You refer to the total loss of vision?

Mr. ANDERSON.—No, I refer to the fact that there is no proof of subsequent infection—that the infection has caused the injury complained of.

The COURT.—Well, the motion is denied.

Mr. ANDERSON.—Note the exception. (Page 102, Transcript of Evidence.) I don't know whether I noted the exception yesterday, your Honor, to the ruling of the Court in the proffered

(Testimony of Doctor Charles S. Vivian.)
 testimony of the nurse. If I did not, I would like to reserve an exception upon that ruling.

The COURT.—Yes, very well.

DEFENDANT'S CASE RESUMED.

TESTIMONY OF DOCTOR CHARLES S. VIVIAN, FOR DEFENDANT (CONTINUED).

Direct Examination by Mr. ANDERSON.

(Page 103, Transcript of Evidence.)

I operated upon the plaintiff sometime about May 8, 1919.

Q. Now, Doctor, you may state what operations you performed upon his eyes, if you can recall. If you have any record of it, you may refresh your recollection as to that.

Objected to on the ground of the relation of physician and patient. Objection sustained. Witness was excused to be recalled later.

TESTIMONY OF DEAN HARDEE CULP, FOR DEFENDANT.

DEAN HARDEE CULP, a witness for defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. ANDERSON.

(Page 105, Transcript of Evidence.)

My name is Culp. I am a laboratory technician. I have had three years university training and about nine years [47] practical experience. I am now located at Whipple Barracks, Veterans

(Testimony of Dean Hardee Culp.)

Bureau Hospital No. 50. I am acquainted with the Wasserman test and have performed it many times. I have performed many thousands of such tests. The Government is equipped to make this test at Whipple. I have charge of that equipment there. I have seen the plaintiff. I made blood tests of him in July, 1923, and July, 1924. We keep a record in a book of the tests made, showing the patient's name, the time and the result. My record of the first test shows that on July 16, 1923, Dr. Paul C. Christian requested a Wasserman test on F. Gomez.

Because of certain objections, Mr. Anderson said, "We will pass from that one just for the moment, if the Court please. We will get it in later, your Honor."

Refreshing my recollection from the record of the second examination, I find that it was made at the request of Doctor Robert Buck, on July 7, 1924. I took the blood myself. Dr. Buck was present. I was acting at his request. I took the sample of blood while he was there and made the test in the regular routine time. It takes quite a little time to do this. The blood is taken one day and the test is made the next. I reported the result of my test to Dr. Buck, and made a record of it at that time. I made the test at the request of Dr. Buck and for his information.

MR. JENNINGS' QUESTIONS ON VOIR DIRE.

The record is in my handwriting and made by myself. I am not a regularly licensed physician.

(Testimony of Dean Hardee Culp.)

I have done laboratory work for nine years—that includes laboratory tests, not chemical. I had no assistance in this particular test; no one else handled the tubes—I did that myself and made the test myself. It was not passed on to anyone else for any treatment whatever of the blood. I gave this blood the regular treatment. I have [48] been at Whipple Barracks two years the first of last month; prior to that I was in the navy. There I did laboratory work. I made Wasserman tests there, reading them myself. After I took the blood, it was placed in a tube. I never studied medicine generally. I took a course in the university to qualify me to make these tests—that is my one job. My courses did not include a graduation degree. I attended the University of Pennsylvania. My practical experience has been under the direction of physicians and surgeons. I made other Wasserman tests at the same time that I made this one.

Direct Examination Resumed by Mr. ANDERSON.

(Page 112 of Transcript of Evidence.)

There were two tests, one with cholesterinized antigen and then an alcoholic antigen and the result in both was four plus strongly positive. Four plus, strongly positive, is ordinarily supposed to mean that the reaction is due to syphilis. It is the strongest reaction that we get. The various grades we have in the positive results are plus and minus and one plus, which are classed as doubtful tests. Two plus, three plus and four plus are classed as

Testimony of Dean Hardee Culp.)
positives, four plus being the strongest reaction
that can be obtained.

I conveyed this information to Doctor Buck and
gave the results of both of the tests that I made.

The test I made in July, 1923, for Doctor Chris-
tian was identically the same as the one I made
for Doctor Buck. I made the two tests at that
time, or rather, one test including the two. At
that time the reaction was four plus—that indi-
cates syphilis. The first test I made was July 16,
1923.

Cross-examination by Mr. JENNINGS.

(Page 114, Transcript of Evidence.)

I made twelve other Wasserman tests the day I
made the [49] first examination. I made eight
others at the time of the second examination.
They were not all positive. The blood from the
eight others was taken the same day. The blood
from each individual was taken and placed in a
tube; on each tube I placed the number and name
of the patient. I did all this myself. The test was
made the day after the blood was taken and the re-
port made at that time. I am absolutely sure that
the tubes did not get mixed up. I followed the same
method of handling when I made the first test.
It is not my place to prescribe any treatment for
a patient. All I do is to make tests. There is
no necessity of making a mistake—it is possible
to make one there the same as anywhere else.
When I made the second test, I did not merely go

(Testimony of Thomas S. Davey.)

on the previous record. I made the same careful test the second time as I did the first time.

TESTIMONY OF THOMAS S. DAVEY, FOR
DEFENDANT.

THOMAS S. DAVEY, a witness for defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. ANDERSON.

(Page 117, Transcript of Evidence.)

My name is Thomas S. Davey. My business is mining. In June, 1923, I was employed by the Southwest Metals Company as mine superintendent of the Blue Bell Mine. I know the plaintiff. He was working at the Blue Bell Mine when I came there in December, 1922. In June, 1923, his foreman was William Swiney. The rules are that an injured man must immediately report to the shift boss, if possible, or the foreman. If he cannot find the foreman or shift boss then he must report to the engineer for relief at the surface. We had a first aid station at Blue Bell, of which I was in charge. We have men stationed in the room provided for that special purpose adjoining the change room and we [50] have an adjoining aid room in which we keep medicines for coughs and colds and such minor remedies. I recall that Gomez came there three or four times to have treatment for his eye previous to June, '23. At those times, I observed that Gomez was apparently suffering from weak eyes and acted and used his eyes as a

Testimony of Thomas S. Davey.)

person does in coming from a dark room to a strong light, and always wore his hat over his eyes to evidently protect them from strong light; and his eyes showed a weak condition—that is, they were watery and showed general weakness. I gave him medicine prescribed by the doctor and left there for that purpose.

It is the duty of the mine foreman to check every man coming off shift and to take reports of all explosives and materials used on the shift. If a man were injured, he would report to the foreman. We would treat a man's eyes there for accident or otherwise.

I received no report of an accident to this man on June 13, 1923. I was there and he did not report to me. He did not come to me and say he was injured.

Cross-examination by Mr. JENNINGS.

(Page 121 of Transcript of Evidence.)

I sent the plaintiff to the hospital. He reported to me two or three days afterwards. This was two or three days after his last treatment at the first aid station. The last time I saw him his eyes were no different from the other previous occasions, that I could see. I sent him to the hospital because he asked to go. Usually the men come for first aid treatment had some dirt in their eyes. A man working under ground is liable to get something in their eyes and then they would come to the first aid station and we would wash it out and help them clean it up. As far as I know, this did not hap-

(Testimony of Thomas S. Davey.)

pen to the plaintiff. I washed his eye out, but there was no sand or dirt in his eye at that [51] time. His eye was inflamed when he went to the hospital, but not swollen that I could see. Both of his eyes were affected, but the left one, I believe, was inflamed a little more than the other. The plaintiff did not tell me that he was struck in the eye.

The shift boss is always at the top when the shift is over. Both the shift boss and the foreman are always there until all men have disappeared.

Redirect Examination by Mr. ANDERSON.

(Page 124, of Transcript of Evidence.)

The long bars given to miners to bar down rock above them are so long in order that they may reach forward and keep from being under the rock.

TESTIMONY OF WILLIAM SWINEY, FOR DEFENDANT.

Mr. SWINEY, a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. ANDERSON.

(Page 126, Transcript of Evidence.)

My name is William Swiney. I am a miner. I worked at the Blue Bell Mine in June, 1923. I am not working now. I have been a miner since 1881. The last time I worked at the Blue Bell for about nine months. Altogether I have worked there three or four years. I have known the plain-

(Testimony of William Swiney.)
tiff for eight or nine months. He worked for us about that long when I left there. I was his shift boss. He never reported to me any injury to his eyes. I did not observe his eyes particularly more than I have seen him wearing glasses all afternoons around town and around the Blue Bell Mine. When the men came off shift, it was my duty to check the report of explosives and timber and all accidents that occurred in the mine during the shift. He never reported any accident to me. I was always there when he went off shift. I was never absent [52] when they came off. I checked out all the men myself. We had a desk there for that business. If they have been injured or hurt or any trouble or anything wrong, they would report to me.

Cross-examination by Mr. JENNINGS.

It is the duty of the shift boss to see that men don't get hurt; to see that they are on time; to receive all reports of injuries; to check all explosive reports and timber that is used. I always go down to where the men are working and show them what to do. At any time during the shift that I go thru and see anything wrong, I call their attention to it. I checked the plaintiff out on the night of the 13th or 14th whatever it was. Plaintiff worked for me for two weeks. If any man did come off shift, I remembered him for I had a book there to check him off. I remember that night because he reported coming off shift. I am not testifying because it was my habit to be there,

(Testimony of William Swiney.) .

but because it was compulsory for me to be there. I was never absent when a man came off shift. I remember June 13, 1923, because on the morning of the 16th I turned his card over to another boss. He was under my direction from the first to the 15th, but not from the 16th to the 31st. He was a very good workman. The only thing I noticed about his eyes was that in the afternoons, around the mine and up at the store, he was wearing glasses—that is not common around a mine.

TESTIMONY OF JOSEPH L. WHITE, FOR
DEFENDANT.

JOSEPH L. WHITE, a witness for the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. ANDERSON.

(Page 131, of Transcript of Evidence.)

My name is Joseph L. White. I am a Mining Engineer. I am now the general Mine Superintendent for the Southwest Metals [53] Company. I first went to the Blue Bell Mine in 1914. I know the plaintiff, Gomez. I have known him since March, 1919. At that time I was Superintendent at Blue Bell. I have observed the plaintiff's eyes. The appearance of his eyes now are just about as I have always known them. I had occasion to know something about his eyes in 1919. I made a report concerning them at that time.

(The witness was handed a document marked for identification—Defendant's Exhibit No. 2—to refresh his recollection.)

(Testimony of Joseph L. White.)

WITNESS.—I don't know whether he reported to me personally but he reached me and I saw him at that time. I saw him and observed his eye. He reported that he had been struck in the left eye by a piece of rock. He was treated at the first aid station.

(Questions by Mr. JENNINGS.)

I have no independent recollection of these facts. I am testifying from the signed statement. It is signed by myself. The typewriting was done by Mr. H. E. Bagley, the clerk at the mine. I got the information from the injured party and know that the report was true at that time. I did not do the typewriting. I read it before I signed it. I am relying largely upon the memorandum. I am quite sure that the information is correct. I gathered the information from the man himself. You see, I speak some Spanish. Gomez does not speak English very much and I could carry on a conversation with him about matters underground.

Direct Examination Resumed by Mr. ANDERSON.

The plaintiff was sent to the hospital after having argyrol dropped in his eye. The card Marked Defendant's Exhibit No. 2 was made in the usual course of business and is a record [54] of the old Consolidated Arizona Smelting Company. That is my signature. It was made at that time and I knew it was correct and was filed as part of the accident that I had testified about.

(Defendant's Exhibit No. 2 was admitted and read by Mr. Anderson.)

(Testimony of Joseph L. White.)

Mr. ANDERSON.—Gentlemen, I will read you this,—

“Consolidated Arizona Smelting Co. File A550. Blue Bell Mine. May 8th, 1919. If accident involves serious or fatal injury telephone immediately to the Hospital and Safety Department, also when an inquest is to be held. Injured person’s name: Franc. Gomez. Nationality: Mexican. About how old? 37 yrs. Occupation: Stoper Miner. Pay-roll No. 133. Daily wage? \$4.65. Married or single: Married. Address: Blue Bell Mine. City or town: Mayer. State: Arizona. In whose service? Cons. Arizona Smelt Co.. General duties: Operation Stoper Machine. How long employed prior to accident? 1 yr. 6 mo. Experience: Had he performed similar work prior to this employment? Yes. Was he engaged in his regular occupation at the injury? Yes. Was the injured person familiar with the work engaged in, or the machine being operated at the time of the accident; state experience so far as known? Yes. Was he in full charge of machine, to what extent, could he start and stop at will? (Blank) Was the machine sound and in good working order at the time of the accident? (Blank) Last inspected? (Blank) Probable period of disability? (Blank) Nature and extent of injury? Piece of rock hit him in left eye. Name of attending Surgeon, if any attending? None.

(testimony of Joseph L. White.)

First aid given, by whom? F. C. Hinman. Sent or taken to Hospital? Yes. Has he returned to work? Yes. If so, when? May 16th, 1919. Off 7 days only May 8th to 15th inclusive. Did the injured employee ever give notice of any defect in ways, works or apparatus connected with accident, and if so, was such defect remedied? (Blank) Did the injured person make any statement after the accident as to its cause, or admitting his carelessness, and if so, what did he say, and who heard his statement (Blank) The Accident. Date May 8th, 1919. Hour 2:30 A. M. Place: 1045 Stope. What light was there at the time and place of the accident? Carbide lamps. Name of the Foreman in charge, and what was he doing? Frank Chamis—Shift Boss. Names and addresses of all persons who witnessed the accident, or claim to have witnessed it, or who would probably know anything about it: (Blank) [55] Was the injury due to want of care on the part of the injured person, or negligence of any other person; if so, whom? (Blank) Explain how the accident happened, its cause, etc. If necessary illustrate by rough sketch: Hit in left eye by piece of flying rock. J. L. White, Superintendent.”

Now look it over, if you desire, Gentlemen. Handing Exhibit to jury.) You may ask him.ardon me just a minute.

(Testimony of Joseph L. White.)

Previous to June 13, 1923, I don't know the exact dates, but I had seen him come to the first aid station on two different occasions to be treated at those times. He showed very plainly that his eyes were bothering him; he was squinting.

Cross-examination by Mr. JENNINGS.

(Page 138, of Transcript of Evidence.)

The report marked Defendant's Exhibit No. 2 was made by my conversation with the plaintiff. I had no interpreter. On May 8, 1919, he told me he was hit by a piece of flying rock.

(In answer to a question by a juror:)—In trying to get information from a Mexican, in my position, between motions and words, I can generally get the information desired in common ordinary work.

Recross-examination by Mr. JENNINGS.

(Page 140 of Transcript of Evidence.)

The difference in the statement—being struck in the eye with a piece of rock and having oil splashed in the eye might be very much the same, but I can distinguish between the words oil and rock.

Redirect Examination Continued by Mr. ANDERSON.

(Page 140, Transcript of Evidence.)

He claimed that he was injured in the left eye and he was sent to the hospital and treated for it in 1919.

TESTIMONY OF GEORGE H. ROSEVEARE,
FOR DEFENDANT.

GEORGE H. ROSEVEARE, being called as a witness on [56] behalf of the defendant, and first duly sworn, testified as follows:

Direct Examination by Mr. ANDERSON.

(Page 141, Transcript of Evidence.)

My name is George H. Roseveare. I live in Clarkdale. I am a crusherman, employed by the United Verde Copper Company. I am working in the crusher at Clarkdale. I know the plaintiff, Gomez. I had known the plaintiff since he came to work there some time in the last of May, 1924. I have observed him in his work about the place. He came there first as a laborer and then asked to use powder which he was privileged to do. Whenever the chute plugs up he goes up there and shoots it. I have noticed his work around there and he is able to see and do the work he is employed to do. I have never noticed any difficulty.

TESTIMONY OF DOCTOR CHARLES W.
VIVIAN, FOR DEFENDANT (CONTINUED).

Direct Examination by Mr. ANDERSON.

(Page 143 of Transcript of Evidence.)

I have made a special study of syphilis and kindred diseases. I am located at Phoenix. I am not employed by the Southwest Metals Company. I heard the testimony of Dr. Buck here yesterday

(Testimony of Doctor Charles W. Vivian.)

and I also heard the testimony of Mr. Culp as to the results of the Wasserman test. (Page 148, Transcript of Evidence.) I heard the testimony of Dr. Buck and of Mr. Culp.

Mr. ANDERSON.—Q. Now, assuming the facts stated by the doctor and Mr. Culp in their testimony to be true, can you, basing your evidence upon that assumption of those facts only, give your opinion as to what is the condition present in his eye?

A. Yes, sir.

I object to that question, if the Court please, on the ground that the witness cannot predicate or base his opinion upon the testimony heard in the courtroom for the reason it invades the province of the Court and the jury.

The COURT.—Well, I don't know that that objection covers it.

Mr. JENNINGS.—That is the testimony of ———.

The COURT.—The question is too indefinite. The objection is [57] sustained on the ground that this question is too indefinite, and not the proper method of examination, and an exception.

Mr. ANDERSON.—Was there an objection that it was too indefinite?

The COURT.—Yes, you may have an exception to the ruling. I ruled on it this morning and the ruling still stands.

TESTIMONY OF DR. E. A. GATTERDAM, FOR
DEFENDANT.

Dr. E. A. GATTERDAM, a witness for defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. ANDERSON.

(Page 150, Transcript of Evidence.)

My name is E. A. Gatterdam. I am a physician and surgeon, and a graduate of the University of Wisconsin and Rush Medical College. I have practiced my profession for seven years. I am now stationed at United States Veterans Hospital No. 50. I have been there approximately three years. I heard the testimony of Dr. Buck and Mr. Culp. Assuming the facts testified to be true, I can give my opinion as to what is the condition that exists in the plaintiff's eye.

Mr. ANDERSON.—Q. What, in your opinion, assuming the facts as stated by Dr. Buck to be true and the facts stated by Mr. Culp to be true, what is the condition—the cause of the condition that exists in his eye?

Mr. JENNINGS.—That is objected to on the ground that the question is too indefinite and because it invades the province of the Court and jury in asking for an opinion based upon other testimony or the opinions of other experts.

The objection is sustained and exception is requested and allowed. (Page 151, Transcript of Evidence.)

TESTIMONY OF DR. PAUL C. CHRISTIAN,
FOR DEFENDANT.

Dr. PAUL C. CHRISTIAN, the witness for the defendant, being first duly sworn, testified as follows: [58]

Direct Examination by Mr. ANDERSON.

(Page 152, Transcript of Evidence.)

My name is Paul C. Christian, a physician and surgeon. I am a graduate of the University of Oklahoma. I have practiced my profession fifteen years. I am now stationed at Fort Whipple and I have specialized in syphilology and urology. I have specialized in these subjects for ten years. My particular work at Fort Whipple is Assistant Surgeon in charge of the urological and syphilological department. I first saw the plaintiff about June 18, 1923. I was preparing to relieve Dr. Franklin for a month at the Humboldt Hospital and went over there on 18th to acquaint myself with the work he expected me to do, and there came in contact with the patient. I took over the work for Dr. Franklin for the Southwest Metals Company. I observed the condition of the plaintiff's eye at that time and prescribed for it. The relation of physician and patient existed at that time. The condition of the plaintiff's eye was an iritis and interstitial ceratitis. In my opinion, it was due to syphilis. I gave mercury which caused it to clear up somewhat—that is a standard treatment for a syphilitic condition. I had a Wasserman test of his blood made at that

(Testimony of Dr. Paul C. Christian.)
time by Mr. Culp. The report that I received was four plus positive. I could not detect any evidence of any cut or scar on the exterior of the eye at that time. The date I reported to the hospital for actual duty was June 20, 1923. In my opinion, the sole cause of the condition in the plaintiff's eye at that time was chronic syphilis and interstitial ceratitis.

Cross-examination by Mr. JENNINGS.

(Page 154, Transcript of Evidence.)

I left there July 20, 1923. That is my signature. I think I delivered that instrument to the plaintiff. The instrument [59] was marked as Plaintiff's Exhibit No. 1 and admitted and read by Mr. Jennings. "Consolidated Arizona Smelting Company, Humboldt, Arizona. Blubell Department, dated July 9, 1923, ———, Foreman. Mr. Frances Gomez is discharged from the hospital this day, and able to return to duty having laid off for the following reasons: Injury to left eye, cornea ulcer. Date entered July 14; date discharged July 19. Dr. R. L. Franklin, per Dr. Christian."

Redirect Examination by Mr. ANDERSON.

(Page 155, Transcript of Evidence.)

Interstitial ceratitis is an ulcerated condition on the inner side of the eye.

Those two sheets are the hospital's record of this patient. I have an independent recollection of the treatment given without the use of the record. The treatment given the patient was as follows: The room was shaded to protect the patient from the

(Testimony of Dr. Paul C. Christian.)

light and he was kept quietly in bed and was given mercury internally and mercury locally and his eye was kept bandaged to further shade it from the light and it was washed with argyrol once or twice a day and the pupil was kept dilated with atropin. I saw the plaintiff every day from June 20th until the date of his discharge—I believe the 18th or 19th. I have seen his eye since—it is my opinion that the sole cause of the present condition of his eye is syphilitic interstitial ceratitis.

Defendant rests.

Mr. JENNINGS.—According to the American Mortality Tables, forty-four years of age is 25.27 years.

PLAINTIFF'S EVIDENCE IN REBUTTAL.
TESTIMONY OF DR. EDWIN C. BAKES, FOR
PLAINTIFF (IN REBUTTAL).

Direct examination by Mr. JENNINGS.

(Page 159, Transcript of Evidence.)

A corneal ulcer is on the outside of the eye produced by external causes.

Cross-examination by Mr. ANDERSON.

(Page 160, Transcript of Evidence.)

An ulcer would not be produced by syphilis on the outside of the eye. It is not an ulcer unless it is on the [60] external surface.

Redirect Examination by Mr. JENNINGS.

(Page 160, Transcript of Evidence.)

There is no connection between a syphilitic con-

dition, if he has it, and the condition of his eye. The plaintiff rests.

Thereupon, the defendant renewed the motion for a directed verdict. The motion was overruled and an EXCEPTION was requested and allowed. (Page 175, Transcript of Evidence.)

(Argument of counsel to the jury.)

Thereupon the jury was instructed by the Court as to the law of the case.

The jury then retired and later returned into open court their written verdict, finding in favor of the plaintiff and assessing his damage at the sum of One Thousand (\$1000.00) Dollars.

The foregoing bill of exceptions contains all of the evidence received upon the trial of this action or relating to the foregoing exceptions.

AND, WHEREAS, the matters and things above set forth do not duly appear of record, the defendant Southwest Metals Company presents its bill of exceptions in said cause, and prays that the same may be signed and sealed and made of record in this cause by this Honorable Court pursuant to the law in such cases.

ANDERSON, GALE & NILSSON,
Attorneys for Defendant.

Approved:

_____,
Attorneys for Plaintiff. [61]

ORDER SETTLING BILL OF EXCEPTIONS.

The foregoing bill of exceptions having been presented to me for allowance within the time fixed by order of the Court for such purpose and the same having been examined by me and found to be correct, the same is now, on this 25th day of October, 1924, duly signed, approved and allowed, and made a part of the record herein.

F. C. JACOBS,
Judge of the United States District Court.

[Endorsed]: Filed Oct. 4, 1924. C. R. McFall,
Clerk. By Paul Dickason, Chief Deputy Clerk.
[62]

Regular October, 1924, Term, at Phoenix.

In the United States District Court in and for the
District of Arizona.

Honorable F. C. JACOBS, United States District
Judge, Presiding.

(Minute Entry of Monday, October 13th, 1924.)

No. L-151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corpora-
tion,

Defendant.

MINUTES OF COURT—OCTOBER 13, 1924—
ORDER OVERRULING MOTION FOR
NEW TRIAL.

Defendant's motion for a new trial is now argued,
Whereupon, IT IS ORDERED BY THE
COURT that the said motion is DENIED. [63]

In the District Court of the United States, in and
for the District of Arizona.

No. L-151.

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corpora-
tion,

Defendant.

ORDER FIXING AMOUNT OF SUPER-
SEDEAS AND COST BOND.

Upon motion of defendant herein that the amount
of the supersedeas and cost bond be fixed herein,—

IT IS ORDERED that such supersedeas and
cost bond be fixed at the sum of One Thousand Five
Hundred (\$1,500.00) Dollars, and defendant be al-
lowed thirty days in which to file said bond.

IT IS FURTHER ORDERED that no execu-
tion shall issue pending the filing of said supersedeas
and cost bond.

Done in open court this 13th day of October, 1924.

F. C. JACOBS,

Judge.

[Endorsed]: Order Fixing Amount of Superseedeas and Cost Bond. Filed Oct. 14, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk.
[64]

Regular October, 1924, Term, at Phoenix.

In the United States District Court in and for the
District of Arizona.

Honorable F. C. JACOBS, United States District
Judge, Presiding.

(Minute Entry of Thursday, October 16th, 1924.)

No. L-151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corpora-
tion,

Defendant.

MINUTES OF COURT—OCTOBER 16, 1924—
ORDER EXTENDING TIME TO AND IN-
CLUDING OCTOBER 18, 1924, TO SETTLE
BILL OF EXCEPTIONS.

Owing to the stress of court business, the Court having been unable to settle defendant's bill of exceptions within the time heretofore allowed,—

IT IS NOW ORDERED that time within which to settle said bill of exceptions be extended to and including Saturday, the 18th day of October, 1924.
[65]

Regular October, 1924, Term, at Phoenix.

In the United States District Court in and for the
District of Arizona.

Honorable F. C. JACOBS, United States District
Judge, Presiding.

(Minute Entry of Saturday, October 18th, 1924.)

No. L-151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corpora-
tion,

Defendant.

MINUTES OF COURT—OCTOBER 18, 1924—
ORDER EXTENDING TIME TO AND IN-
CLUDING OCTOBER 25, 1924, TO SETTLE
BILL OF EXCEPTIONS.

Owing to continued stress of court business, the Judge being unable to settle the defendant's bill of exceptions herein within the time heretofore allowed,—

IT IS NOW ORDERED that further extension of time is hereby granted to and including Saturday,

the 25th day of October, 1924, to settle said bill of exceptions. [66]

Regular October, 1924, Term, at Phoenix.

In the United States District Court in and for the
District of Arizona.

Honorable F. C. JACOBS, United States District
Judge, Presiding.

(Minute Entry of Saturday, October 25th, 1924.)

No. L-151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corpora-
tion,

Defendant.

MINUTES OF COURT—OCTOBER 25, 1924—
ORDER EXTENDING TIME TO AND IN-
CLUDING NOVEMBER 1, 1924, TO SETTLE
BILL OF EXCEPTIONS.

IT IS ORDERED that Attorneys Jennings & Strouse, counsel for the plaintiff, may withdraw from the file in this case the reporter's transcript of the evidence for one week.

IT IS FURTHER ORDERED that time for settling defendant's bill of exceptions is further extended to Saturday, November 1st, 1924. [67]

Regular October, 1924, Term, at Phoenix.

In the United States District Court in and for the
District of Arizona.

Honorable F. C. JACOBS, United States District
Judge, Presiding.

(Minute Entry of Saturday, November 1st, 1924.)

No. L-151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corpora-
tion,

Defendant.

MINUTES OF COURT—NOVEMBER 1, 1924—
ORDER RE WITHDRAWAL OF BILL OF
EXCEPTIONS.

IT IS ORDERED BY THE COURT that the
proposed bill of exceptions filed herein be with-
drawn for forwarding to the attorneys for the de-
fendant, Southwest Metals Company, together with
amendments proposed by the Court, to have the
same engrossed. [68]

In the District Court of the United States, in and
for the District of Arizona.

No. L-151.

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corpora-
tion,

Defendant.

PETITION FOR WRIT OF ERROR.

The Southwest Metals Company, a corporation incorporated under the laws of the State of Delaware, and duly authorized to transact business in the State of Arizona, defendant in the above-entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment entered in accordance therewith on August 8th, 1924, and by the order of this Court entered October 13, 1924, overruling its motion for a new trial, comes now by Anderson, Gale & Nilsson, its attorneys, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided;

That in accordance with an order of this Court, dated October 13, 1924, this defendant has filed a supersedeas and cost bond in the sum of Fifteen Hundred Dollars (\$1500.00).

WHEREFORE, defendant prays that an order be made that all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals, and that a transcript of the record, proceedings and documents upon which said verdict, judgment and order were based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

ANDERSON, GALE & NILSSON,
Attorneys for Defendant.

[Endorsed]: Petition for Writ of Error. Filed Nov. 11, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [69]

In the District Court of the United States, in and
for the District of Arizona.

No. L-151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corpora-
tion,

Defendant.

ORDER ALLOWING WRIT OF ERROR AND
STAY OF EXECUTION.

Upon motion of Messrs. Anderson, Gale & Nilsson, attorneys for the defendant, and upon filing a

petition for writ of error and supersedeas and cost bond in the sum of Fifteen Hundred Dollars (\$1500.00) and assignment of errors, it is ordered that writ of error be and the same is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein; and

The supersedeas and cost bond having been filed herein, it is further ordered that all proceedings herein be suspended until the final determination of this writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Phoenix, Arizona, November 11th, 1924.

F. C. JACOBS,

District Judge.

[Endorsed]: Order Allowing Writ of Error and Stay of Execution. Filed Nov. 11, 1924. C. R. McFall, Clerk. By M. R. Malcolm, Deputy Clerk. [70]

In the District Court of the United States, in and
for the District of Arizona.

No. L-151.

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corpora-
tion,

Defendant.

SUPERSEDEAS AND COST BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, Southwest Metals Company, a corporation, of the State of Delaware, as principal, and the National Surety Company of New York, a corporation in the State of New York, as surety, are held and firmly bound unto Francesco Gomez in the sum of Fifteen Hundred Dollars (\$1500.00), to be paid to said Francesco Gomez, for the payment of which well and truly to be made we bind ourselves, our successors or assigns jointly and severally by these presents.

Sealed with our seals this 27th day of October, A. D. 1924.

WHEREAS, lately at a session of the District Court of the United States for the District of Arizona, in a suit pending in said court wherein Francesco Gomez was plaintiff and the Southwest Metals Company was defendant, judgment was rendered against said defendant, Southwest Metals Company, in the sum of One Thousand Dollars (\$1,000.00), and

WHEREAS, said defendant Southwest Metals Company filed a motion for a new trial which was overruled and denied, and

WHEREAS, said Southwest Metals Company is prosecuting a writ of error to the United States Court of Appeal for the Ninth Circuit, to review the judgment of the United States District Court, as aforesaid, and the whole thereof and the order

denying defendant's motion for a new trial, and it is [71] desirous of staying execution of said judgment until said writ of error shall have been perfected and determined,—

NOW, THEREFORE, the condition of this obligation is such that if the above Southwest Metals Company shall prosecute said writ of error to effect and answer all damages and costs if it shall fail to make good its appeal, then this obligation shall be void; otherwise to remain in full force and effect.

SOUTHWEST METALS COMPANY,

Principal.

By O. F. JANSSEN,

Auditor.

NATIONAL SURETY COMPANY OF
NEW YORK.

[Seal]

By A. H. GALE,

Its Attorney in Fact.

Approved by F. C. Jacobs, Judge of the United States District Court for the District of Arizona, this 11th day of November, 1924.

F. C. JACOBS,

Judge.

[Endorsed]: Supersedeas and Cost Bond. Filed Nov. 11, 1924. C. R. McFall, Clerk. By M. R. Malcolm, Deputy. [72]

In the District Court of the United States, in and
for the District of Arizona.

No. L-151.

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corpora-
tion,

Defendant.

ASSIGNMENT OF ERRORS.

Comes now the Southwest Metals Company, a corporation duly organized under the laws of the State of Delaware and authorized to transact business in the State of Arizona, by Anderson, Gale & Nilsson, its attorneys, and in connection with its petition for a writ of error herein says:

That in the record and proceedings during the trial of the above-entitled cause and in said judgment in said District Court of Arizona, and in the order by said Court overruling defendant's motion for a new trial, error has intervened to its prejudice, and this defendant here makes the following assignments of errors upon which it will rely in the prosecution of the writ of error, in the above-entitled cause, to wit:

1. The United States District Court for the District of Arizona erred in overruling defendant's demurrer to the complaint.

2. The United States District Court for the District of Arizona erred in overruling defendant's objection to the introduction of any evidence made at the beginning of the trial.

3. The United States District Court for the District of Arizona erred in sustaining the objection of the plaintiff to the following questions, thereby excluding evidence offered by the defendant during the examination of Dr. Robert T. Franklin, on the ground that such evidence was privileged: [73]

Q. You heard his testimony here while he was on the stand, stating that he came to the hospital where you were?

A. Yes, sir.

Q. And you heard him state that you took some dirt out of his eye?

Q. Now, I ask you Doctor, did you or did you not remove any dirt from his eye on that occasion?

for the reason that said evidence was offered solely for the purpose of contradicting the testimony of the plaintiff that the doctor had removed dirt from his eye.

4. The United States District Court for the District of Arizona erred in sustaining the objection of the plaintiff to the following question, thereby excluding evidence offered by the defendant during the examination of Doctor Charles S. Vivian on the ground that such evidence was privileged:

Q. Did you treat both of his eyes at that time?

for the reason that said testimony was offered by the defendant solely for the purpose of contradicting a statement made by the plaintiff in his testimony that the doctor had treated both of his eyes.

5. The United States District Court for the District of Arizona erred in sustaining the objection to the testimony of Tessie M. Benedict, a nurse, on the ground that her testimony was privileged under Section 1677, sub-section 6, of the Revised Statutes of Arizona, 1913, Civil Code, for the reason that she was not a physician or surgeon, and, therefore, her testimony was not privileged.

6. The United States District Court for the District of Arizona erred in sustaining the objection of the plaintiff to the following question, thereby excluding evidence offered by the defendant during the examination of Dr. Robert C. Buck, on the ground that such evidence was irrelevant and immaterial:

Q. Were you appointed under the order of the Court to examine this man?

for the reason that said evidence was offered for the purpose of showing that the witness was an impartial and unbiased witness. [74]

7. The United States District Court for the District of Arizona erred in sustaining the objection of the plaintiff to the following question on cross-examination, thereby excluding evidence sought to be brought out by the defendant during the cross-examination of Dr. Edwin C. Bakes, on the ground that it was immaterial:

Q. You make it a habit of appearing for the plaintiff in these personal injury cases?

for the reason that the question was propounded to show the interest, bias and prejudice of the witness.

8. The United States District Court for the District of Arizona erred in admitting, over the objection of the defendant, the following testimony by Dr. Edwin C. Bakes:

Q. Do you know what the term occupational or industrial blindness is? A. Yes, sir.

Q. What is the term?

A. It is considered that vision less than 20/70 constitutes occupational blindness. This is a condition in which the individual who has a total blindness of 20/70 is incapacitated in a great many ways, as far as work is concerned, that is, doing accurate work—that is, if the person has only 20/70 vision. In both eyes he would be occupationally blind. The plaintiff is occupationally blind in his left eye.

for the reason that industrial blindness was not an issue in the case and there was nothing in the pleadings concerning it.

9. The United States District Court for the District of Arizona erred in sustaining the objection of the plaintiff to the following question, thereby excluding testimony offered by the defendant during the examination of Dr. Charles W. Vivian:

Q. Now, assuming the facts stated by the Doctor and Mr. Culp in their testimony to be true, can you, basing your evidence upon that

assumption of those facts only, give your opinion as to what is the condition present in his eye? A. Yes, sir.

for the reason that this question was propounded to the physician as a hypothetical question based on medical testimony adduced on behalf of the defendant only, all of which the witness had heard in the courtroom and was, therefore, the [75] same as though all of the evidence which the witness had heard in the courtroom had been repeated to him in the question.

10. The United States District Court for the District of Arizona erred in excluding the following testimony offered by the defendant during the examination of Dr. E. A. Gatterdam:

Q. What in your opinion, assuming the facts as stated by Dr. Buck to be true and the facts as stated by Mr. Culp to be true, what is the condition—the cause of the condition that exists in his eye?

for the reason that this question was propounded to the physician as a hypothetical question based on medical testimony adduced on behalf of the defendant only, all of which the witness had heard in the courtroom and was, therefore, the same as though all of the evidence which the witness had heard in the courtroom had been repeated to him in the question.

11. The United States District Court for the District of Arizona erred in denying and overruling defendant's motion for a directed verdict at the close of all of the evidence.

12. The verdict of the jury is contrary to law.

13. The verdict is not supported by and is contrary to the evidence.

14. The United States District Court for the District of Arizona erred in entering judgment upon the verdict and said judgment is contrary to law.

15. The United States District Court for the District of Arizona erred in entering judgment upon the verdict and said judgment is not supported by and is contrary to the evidence.

16. The United States District Court for the District of Arizona erred in refusing to grant the defendant a new trial. [76]

WHEREFORE, said Southwest Metals Company, by reason of the errors aforesaid, prays that said judgment against it may be reversed, set aside and held for naught.

ANDERSON, GALE & NILSSON,
Attorneys for Defendant.

[Endorsed]: *Order Allowing Writ of Error and Stay of Execution.* Filed Nov. 11, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk.
[77]

In the District Court of the United States in and
for the District of Arizona.

No. L-151—PRCT.

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corpora-
tion,

Defendant.

WRIT OF ERROR.

The President of the United States to the Honor-
able Judge of the United States District Court,
for the District of Arizona, GREETING:

Because in the records and proceedings, as also
in the rendition of the judgment, of a plea which
is in the aforesaid District Court before you be-
tween Francisco Gomez, plaintiff, and the South-
west Metals Company, a corporation, defendant,
manifest error has happened to the great damage
of the said defendant, as by its complaint and as-
signment of errors appears, we being willing that
error, if any there has been, shall be duly corrected
and full and speedy justice done to the parties
aforesaid in this behalf, do command you if judg-
ment be therein given, that then, under your seal,
distinctly and openly, you send the record and pro-
ceedings aforesaid, with the things concerning the
same, to the United States Circuit Court of Ap-

peals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit within thirty (30) days of the date of this writ, in said Circuit Court of Appeals, to be then and there held, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may [78] cause further to be done therein to correct that error what of right and according to the law and customs of the United States shall be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 24th day of November, 1924, and of the Independence of the United States the one hundred and forty-ninth.

[Seal]

C. R. McFALL,
Clerk.

By M. R. Malcolm,
Deputy Clerk.

[Endorsed]: Writ of Error. Filed Nov. 24, 1924.
C. R. McFall, Clerk. By M. R. Malcolm, Deputy.
[79]

The Answer of the Judge of the District Court of the United States for the District of Arizona, to the within writ of error:

As within commanded, I certify under the seal of my said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaintiff whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals for the Ninth Cir-

cuit, within mentioned, at the day and place within contained.

By the Court.

[Seal]

C. R. McFALL,
Clerk U. S. District Court for the District of Arizona.

By M. R. Malcolm,
Deputy Clerk. [80]

In the District Court of the United States in and
for the District of Arizona.

No. L-151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corporation,
Defendant.

Defendant.

CITATION ON WRIT OF ERROR.

The President of the United States to Francisco Gomez and Messrs. Jennings & Strouse and D. A. Fraser, Your Attorneys, GREETING:

You are hereby cited and admonished to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, California, in said Circuit, within thirty (30) days from the date hereof, pursuant to the writ of error filed in the Clerk's office of the District Court of the United

States for the District of Arizona, wherein the Southwest Metals Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable F. C. JACOBS, Judge of the United States District Court for the District of Arizona, this 24th day of November, 1924, and of the Independence of the United States the one hundred and forty-ninth.

F. C. JACOBS,
United States District Judge.

[Endorsed]: Filed Nov. 29, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [81]

UNITED STATES MARSHAL'S OFFICE.

I hereby certify that I received the within writ on the 25th day of November, 1924, and personally served the same on the 25th day of November, 1924, at Phoenix, Ariz., by serving Jennings, Strouse and D. A. Fraser with a certified copy of this writ.

G. A. MAUK,
U. S. Marshal.
By T. E. Benton,
Deputy.

In the District Court of the United States in and
for the District of Arizona.

No. L-151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corpora-
tion,

Defendant.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of record in this case to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit upon writ of error heretofore sued out by the Southwest Metals Company and included in said transcript, the following pleadings, proceedings and papers on file, to wit:

- (1) Plaintiff's amended complaint.
- (2) Defendant's demurrer and answer.
- (3) The verdict.
- (4) The judgment.
- (5) All minute entries in this case.
- (6) Bill of exceptions.
- (7) All exhibits offered by the defendant whether admitted or refused.
- (8) Motion for new trial.
- (9) Orders extending time to prepare bill of exceptions.

- (10) Order fixing amount of supersedeas and cost bond.
- (11) Supersedeas and cost bond and approval.
- (12) Petition for writ of error.
- (13) Assignment of errors. [82]
- (14) Order granting writ of error and stay of execution.
- (15) Original writ of error.
- (16) Original citation on writ of error.
- (17) This praecipe.
- (18) Clerk's certificate.

The said transcript to be filed with the Clerk of the Circuit Court of Appeals of the Ninth Circuit at San Francisco, California, before the 24th day of December, 1924.

ANDERSON & GALE,
Attorneys for Defendant.

[Endorsed]: Praecipe for Transcript of Record. Filed Nov. 24, 1924. C. R. McFall, Clerk. By M. R. Malcolm, Deputy Clerk. [83]

In the District Court of the United States, in and for the District of Arizona.

No. L-151 (PRESCOTT).

FRANCISCO GOMEZ,

Plaintiff,

vs.

SOUTHWEST METALS COMPANY, a Corporation,
tion,

Defendant.

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the District Court of the United States for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said United States District Court for the District of Arizona including the records, papers and files in the case of Francisco Gomez, plaintiff, versus Southwest Metals Company, a corporation, defendant, said case being numbered 151 (Prescott) on the Law docket of said court.

I further certify that the foregoing 83 pages, numbered from 1 to 83, inclusive, constitute a full, true and correct copy of the record, and of the assignment of errors and all proceedings in the above-entitled cause, as set forth in the praecipe filed in said cause and made a part of this transcript as the same appears from the originals of record and on file in my office as such Clerk.

And I further certify that there is also annexed to said transcript the original writ of error, and the original citation on writ of error issued in said cause.

I further certify that the cost of preparing and certifying to said record, amounting to Thirty-eight & 10/100 Dollars (\$38.10), has been paid to

me by the above-named defendant (plaintiff in error).

WITNESS my hand and the seal of said Court this 16th day of December, 1924.

[Seal] C. R. McFALL,
Clerk of the District Court of the United States,
for the District of Arizona.

By M. R. Malcolm,
Deputy Clerk. [84]

[Endorsed]: No. 4445. United States Circuit Court of Appeals for the Ninth Circuit. Southwest Metals Company, a Corporation, Plaintiff in Error, vs. Francisco Gomez, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona.

Filed December 24, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.